of the action and the remedy sought. *Tull v. United States*, 481 U.S. 412, 417 (1987). In conducting this analysis, courts should recognize the fundamental nature of the right to trial by jury, and thus the analogy "should be liberally construed." *Granfinanciera*, 492 U.S. at 48 (quoting *Schoenthal v. Irving Trust Co.*, 287 U.S. 92, 94 (1932)).

Applying such a liberal construction here, the unfair, deceptive or abusive acts and practices claim is closely analogous to common-law fraud. Both actions share several core elements, including materiality, reliance, omission or misrepresentation, and injury. *Sutherland*, 505 F. 4th at 26 (Cartwright, J., concurring). The Twelfth Circuit majority did not meaningfully apply this *Tull* test, skipping straight to the public rights exception. The concurrence, however, did apply the test, and concluded that there was no common law analog, because common-law fraud required intent and there is no intent requirement found within the cause of action at issue here. *Id.* at 24 (Cartwright, J., concurring). Nevertheless, whether the actions are identical or perfectly analogous is irrelevant. *Pernell v. Southhall Realty*, 416 U.S. 363, 375 (1974). Indeed, what matters is whether the subject matter or "essential function" of the action was "unheard of at common law," not whether every single detail or element aligns. *Id.*; *Tull*, 481 U.S. at 421. No one disputes that fraud existed at common law.

Additionally, other courts have recognized that claims similar to the unfair, deceptive, or abusive acts and practices (UDAAP) prohibition are analogous to common-law fraud. *See Full Spectrum Software, Inc. v. Forte Automation Sys.*, 858 F.3d 666, 676 (1st Cir. 2017). There, the First Circuit evaluated a Massachusetts statute that prohibited "unfair or deceptive" practices and concluded that a claim for "deceptive" conduct was analogous to common-law fraud, deceit, or misrepresentation. *Id.* Because the deceptive part was analogous, the Court said the Seventh Amendment encompassed the claim, regardless of whether a claim for "unfair" conduct was also

analogous. *Id.* Importantly, this means that even if intent were required in order to find an analog, the UDAAP claim would *still* be analogous to a claim at common-law. This is because the intent requirement is implicit in the CFPA's prohibition of "deceptive" activities. *Sutherland*, 505 F.4th at 31 (Bernhard, J., dissenting). Therefore, even though the listed definitions for "unfair" or "abusive" do not include an intent element, because deception is analogous, the entire claim would be analogous.

Furthermore, the nature of the action can be ascertained through an examination of the "nature of the underlying relationship between the parties." *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 568 (1990). Here, the relationship in question is between a bank and its customers. Banks existed at common law too, and in fact, there was a "clear jurisprudential shift during the eighteenth century" in the approach towards fraud due to the fact that society was becoming "increasingly commercialised." Cerian Charlotte Griffiths, *Prosecuting Fraud in the Metropolis*, *1760-1820*, Univ. of Liverpool 3 (September 2017), https://livrepository.liverpool.ac.uk/3012313/1/201042524_Sep2017.pdf. Even if the scope of the deceptive practice here is larger than the scope of deception seen at common law, the nature of the relationship is the same. Therefore, the UDAAP claim is sufficiently analogous to a claim at common law.

Moreover, the second part of the *Tull* test, characterizing the relief sought, is "more important" than whether the statutory action is precisely analogous to the common-law action. 481 U.S. at 420. Here, the relief consisted of monetary damages, a $4.1 million civil penalty, and an injunction. Courts have consistently held that monetary damages are legal relief, not equitable. *See, e.g.*, *Curtis v. Loether*, 415 U.S. 189, 197 (1974); *Terry*, 494 U.S. at 570-71. Similarly, courts have adamantly concluded that civil penalties are legal remedies. *Tull*, 481 U.S.

at 422. The *Tull* court held that the civil penalty there was legal, especially because it was not calculated solely on the basis of equitable restitutionary determinations, such as the profits gained from statutory violations, but simply imposed a maximum penalty of $10,000 per day of violation for purposes of retribution and deterrence. *Id.* at 422-23. Similarly, the CFPB can seek civil penalties of up to $1 million for each day that a violation occurs. 12 U.S.C. § 5565(c)(2)(C).

The Twelfth Circuit suggested that the civil penalty could not be a legal remedy, because it would render the money damages remedy redundant and statutes should be interpreted to avoid redundancy, if possible. *Sutherland*, 505 F.4th at 28 (Cartwright, J., concurring); *Gustafson v. Alloy Co.*, 513 U.S. 561, 574 (1995). However, the two remedies can both be legal without invoking redundancy concerns. The CFPB itself explains that there are key differences between the remedies, including "the link between who pays the money and who receives the money." *Civil Penalty Fund*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/enforcement/payments-harmed-consumers/civil-penalty-fund/ (last visited Dec. 23, 2022). Therefore, the primary forms of relief here, the monetary damages, and civil penalty, were both legal, and the injunctive relief was merely incidental to those other forms of relief. *Tull*, 481 U.S. at 424-25. As such, the relief sought renders this case analogous to one at common law.

B. The Public Rights Exception Does Not Apply to This Action

Under the public rights exception, Congress can fashion causes of action that are closely analogous to common-law claims and place them beyond the domain of the Seventh Amendment by assigning their resolution to a forum in which jury trials are unavailable. *Granfinanciera*, 492 U.S. at 52. This exception is normally invoked when analyzing whether Article III, rather than the Seventh Amendment, limits administrative adjudications. *Sutherland*, 505 F.4th at 7 n.2.

Even assuming that it would be appropriate to invoke the exception with respect to these Seventh Amendment considerations, this case is not about adjudicating public rights, rendering the exception inapplicable.

Just because the government is a party to this matter does not automatically render the matter a "public right." *Jarkesy v. SEC*, 34 F.4th 446, 457-58 (5th Cir. 2022). "The identity of the parties alone" does not determine the requirements of Article III. *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 587 (1985). Just as in *Jarkesy*, where the matter was a private right since the hedge funds defrauded particular investors, here the bank was accused of defrauding particular customers. 34 F.4th at 458. This is not a matter intertwined with the performance of the functions of the executive department; rather, the CFPB is standing in for private plaintiffs. *Sutherland*, 505 F.4th at 34 (Bernhard, J., dissenting). Moreover, this is a case of private rights, because in addition to fraud, UDAAP can be analogized to misrepresentation. *See Full Spectrum Software, Inc.*, 858 F.3d at 676. Misrepresentation is "a classical tort action." *In re Evangelist*, 760 F.2d 27, 32 (1st Cir. 1985). The public rights exception doesn't apply to wholly tort actions. *Granfinanciera*, 492 U.S. at 51.

While the identity of the parties is not determinative, key attributes of the parties can impact whether a case is a public right. *Commodity Futures Trading Com. v. Schor*, 478 U.S. 833, 854 (1986). For example, whether the parties *choose* to invoke agency adjudication is relevant to whether the public rights exception applies. *Id.* Giving the parties a choice protects the jurisdiction of the federal judiciary, mitigating the separations of power concern otherwise associated with the public rights doctrine. *Id.* In *Schor*, both parties were willing to proceed via agency adjudication; the same cannot be said here. *Id.*

Additionally, the public rights exception extends only to cases that "arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments." *Crowell v. Benson*, 285 U.S. 22, 50 (1932). This means that it applies to matters which historically have been determined *exclusively* by the executive or legislative branches. *Stern v. Marshall*, 564 U.S. 462, 485 (2011). As such, the public rights exception allows Congress to devise "novel" causes of action free from the confines of the Seventh Amendment. *Granfinanciera*, 492 U.S. at 51. The matters adjudicated by the CFPB have not historically been left to branches other than the judiciary, and they are certainly not novel. The CFPB enforces eighteen pre-existing statutes, which prior to its creation, were litigated in the judiciary. *Sutherland*, 505 F.4th at 3. Aside from the pre-existing statutes, the CFPB does also enforce the prohibition on unfair, deceptive, or abusive acts and practices, but as previously explained, that claim is so analogous to common-law fraud that it can hardly be considered "novel." Because Congress has taken these cases that have traditionally been tried in Article III courts and authorized a non-Article III forum of its own creation to decide them, "[t]he risk that Congress may improperly have encroached on the federal judiciary is obviously magnified." *Schor*, 478 U.S. at 854 (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 284 (1856)).

Furthermore, Congress may assign the adjudication of public rights to an administrative agency if a jury trial would be "incompatible" with the statutory scheme. *Atlas Roofing v. OSHRC*, 430 U.S. 442, 455 (1977). Expounding on that, the public rights exception applies to cases in which "resolution of the claim by an expert Government agency is deemed *essential* to a limited regulatory objective within the agency's authority." *Stern*, 564 U.S. at 490 (emphasis added). Resolution of the claims by an administrative agency is certainly not essential to the

regulatory objective; if it were, Congress would not have also authorized the government to bring these claims before Article III courts. 12 U.S.C. § 5564. Since the statutory scheme itself authorizes the agency to bring enforcement actions in Article III courts, jury trials are not "incompatible" with the statutory scheme, and thus, would not "dismantle the statutory scheme." *Jarkesy*, 34 F.4th at 455.

Therefore, because there is a common law analog, and because the public rights exception does not apply, the Seventh Amendment applies, meaning Sutherland was unconstitutionally denied its right to a jury trial.

II. THE ADMINISTRATIVE LAW JUDGE REMOVAL SCHEME IS UNCONSTITUTIONAL AND CONTRAVENES THE SEPARARATION OF POWERS DOCTRINE

This Court has emphatically and routinely recognized the fundamental nature of the President's power to remove those who wield executive power on his behalf. *See Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2191-92 (2020). The ALJ wields executive power, and therefore, the removal restrictions on the ALJ contravene the separation of powers doctrine. While it is true that the nature of the ALJ's role is quasi-judicial, this Court has recognized time and time again that executive officers may exercise "duties of a quasi-judicial character," and that when that happens, the President must retain the ability to remove that official at will. *See Myers v. United States*, 272 U.S. 52, 135 (1926). Otherwise, the President cannot "discharge his own constitutional duty of seeing that the laws be faithfully executed." *Id.* As an example, since 1804, the President has had the power to remove territorial judges at will, just as if they were executive officers. *Id.* at 155. This Court has upheld such exercises of the removal power, concluding that although the President may not remove Article III judges, he does indeed maintain his removal power when it comes to other judicial actors, such as territorial

judges. *Id.* at 155-57. Therefore, the quasi-judicial nature of the ALJ's role does not mean that the ALJ is not still wielding executive power.

Indeed, the ALJ does wield significant executive power. The Bureau's ALJ adjudicates matters and issues recommended decisions, consisting of both legal and factual findings. *Sutherland*, 505 F.4th at 4. Through these recommended decisions, the ALJ often serves executive functions by incorporating policy considerations into the decision. *See, e.g.*, Charles H. Koch, Jr., *Policymaking by the Administrative Judiciary*, 56 ALA. L. REV. 693, 694 (2005). Furthermore, there's no requirement that the Director substantively review these recommended decisions before signing off on them. 12 C.F.R. § 1081.402 (2022). If neither party appeals the matter, the Director is instructed to issue a final decision or to order further briefing, but the Director is not statutorily required to even read the recommended decision before making it final. *Id.* Thusly, the ALJ wields executive power.

However, regardless of whether the ALJ's role is of a judicial or executive nature is largely irrelevant. The separation of powers doctrine does not turn on the nature of an officer's functions. In recent cases, this Court has made clear that questions of removal do not hinge on whether the office is primarily considered to be executive, judicial, or legislative in nature. *See, e.g.*, *Collins v. Yellen*, 141 S. Ct. 1761, 1784 (2021) (emphasizing that the nature of an agency's authority is not dispositive in answering questions of removal, because the separation of powers doctrine is implicated whenever an agency does "important work," regardless of that agency's role). Therefore, the President must have sole and illimitable removal power, unless one of two very specific exceptions apply. *Seila*, 140 S. Ct. at 2192.

The first exception, which very clearly does not apply here, is that Congress can create expert agencies led by a group of principal officers removable by the President only for good

cause. *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). Here, the CFPB employs only one ALJ, so this is certainly not a matter of a group of officers. *Sutherland*, 505 F.4th at 37 (Bernhard, J., dissenting). Furthermore, this Court has already made clear that ALJs are inferior officers. *Lucia v. SEC*, 138 S. Ct. 2044 (2018). As such, both parties fully admit that the ALJ is an inferior officer, not a principal one. *Sutherland*, 505 F.4th at 15. Because this Court has declined to extend this exception to different configurations of officers, it is apparent that *Humphrey's Executor* cannot save the removal restrictions here. *Seila*, 140 S. Ct. at 2192.

A. The *Morrison* Exception Does Not Apply Because the Removal Restriction Unduly Trammels the President's Power

The second exception is also inapplicable here. While Congress may provide tenure protections to certain inferior officers with narrowly defined duties, the ALJ does not have such narrowly defined duties. *Morrison v. Olson*, 487 U.S. 654 (1988). Ultimately, there is no bright-line test for determining whether an officer's duties are sufficiently narrow, so the true question is whether the removal restriction "unduly trammels on executive authority." *Id.* at 691. Here, the removal restriction undoubtedly does. The President has a constitutional duty to "take care that the laws be faithfully executed." U.S. Const. art. II, § 3. His ability to do that here is "impermissibly burden[ed]." *Morrison*, 487 U.S. at 692.

The *Morrison* exception is more likely to apply if the officer has limited jurisdiction. *Id.* at 691. In *Morrison*, the officer at issue had limited jurisdiction, because she was only allowed to investigate certain federal officials for certain serious federal crimes, and only within the scope of jurisdiction granted to her by the Special Division pursuant to the request by the Attorney General. *Id.* at 672. The ALJ's jurisdiction, on the other hand, is much broader. Yes, the ALJ can only hear cases that the government chooses to bring before the adjudicative forum, but the Bureau can conduct adjudication proceedings with respect to "*any* person." 12 U.S.C. § 5563

(emphasis added). Unlike the independent counsel in *Morrison* who could only investigate certain officials, the Bureau can therefore investigate anyone. Additionally, the *Morrison* independent counsel could only investigate certain serious federal crimes, whereas the Bureau is allowed to enforce compliance with the Consumer Financial Protection Act of 2010 as well as other federal laws. *Id.* Importantly, the CFPA authorizes enforcement of eighteen federal consumer protection statutes, including provisions on home finance, student loans, credit cards, and banking practices. *Sutherland*, 505 F.4th at 3. There is no requirement that the Bureau only enforce these provisions in "serious" cases, and the breadth of these statutes demonstrates that the Bureau, and correspondingly, the ALJ has quite extensive jurisdiction. This is further demonstrated by the fact that the ALJ essentially has complete discretion and "all powers necessary" to conduct these proceedings. 12 C.F.R. § 1081.104 (2022).

Furthermore, the *Morrison* exception is also more likely to apply if the officer has limited tenure. *Morrison*, 487 U.S. at 691. In *Morrison*, the independent counsel's tenure was limited by the "temporary" nature of the office, given that the office was to be terminated when the officer's single task was accomplished. *Id.* at 672. Here, on the other hand, the ALJ's tenure is not limited whatsoever. 5 U.S.C. § 7521. The ALJ's job is not complete at the conclusion of a single adjudication. Rather, the ALJ's job is continuous and ongoing. Therefore, it cannot be said that the ALJ has a limited tenure.

This Court has also previously weighed the authority wielded by the officer and other practical considerations in determining whether the *Morrison* exception should apply. *Morrison*, 487 U.S. at 691, 695-96. As previously discussed, the ALJ does indeed wield significant policymaking and administrative authority, making it less likely that the *Morrison* exception applies. Furthermore, other practical considerations warrant the same conclusion. For example,

this Court has emphatically shuddered at the thought of vesting significant power in a single non-democratically accountable individual. *See, e.g.*, *Seila*, 140 S. Ct. at 2203. That is exactly what has happened here. Whereas most administrative agencies have multiple ALJs, the CFPB, in contrast, only has one. *ALJs by Agency*, U.S. OFF. OF PERS. MGMT., https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency (last visited Dec. 22, 2022).

Ultimately, the ALJ's broad jurisdiction, unlimited tenure, and significant authority coupled with other practical considerations make the case here very different from *Morrison*. Because this Court has previously refused to broaden the existing exceptions to situations not completely analogous, it is apparent that *Seila* is applicable here, and the President must have illimitable removal control. *Seila*, 140 S. Ct. at 2192. Without it, the President's ability to take care that the laws are faithfully executed will be unduly trammeled.

B. The Dual-Layer-For-Cause Removal Structure is Unconstitutional

Additionally, the removal scheme further unduly trammels the President's power due to its dual-layer-for-cause structure. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010). In *Free Enterprise Fund*, this Court struck down dual-layer-for-cause removal schemes, concluding that granting an officer executive power without the Executive's oversight "subverts the President's ability to ensure that the laws are faithfully executed--as well as the public's ability to pass judgment on his efforts." 561 U.S. at 498. There, the government argued that the Board was required for its expertise and that the structure should therefore be allowed in order to create a "workable government." *Id.* In response, this Court made clear that efficiency, convenience, and functionality cannot save a scheme contrary to the Constitution. *Id.* Nevertheless, the Twelfth Circuit upheld the adjudicative structure here based, in part, on those

same values. *Sutherland,* 505 F.4th at 12. The Twelfth Circuit also upheld the removal scheme, in part, because the Director can modify or set aside the ALJ's conclusions, and the Director is removable at the President's will. *Id.* at 19. However, this Court has rejected that argument as well, concluding that broad power over the office's function is not equivalent to the power to remove the officer. *Free Enter. Fund,* 561 U.S. at 504.

Importantly, ALJs fall in the contours of the *Free Enterprise Fund* holding as they are "Officers of the United States" who exercise significant authority. 561 U.S. at 506; *Lucia*, 138 S. Ct. at 2055. The *Free Enterprise Fund* court noted, in dicta, that its holding did not address the "subset of independent agency *employees* who serve as administrative law judges." 561 U.S. at 507 n.10 (emphasis added). This exclusion was because at the time, it was disputed as to whether ALJs were "Officers of the United States" or employees. *Id.* However, since *Free Enterprise Fund* was decided, this Court has very explicitly resolved that dispute and concluded that ALJs are indeed officers. *Lucia*, 138 S. Ct. at 2055. Therefore, the logic of *Free Enterprise Fund* should undoubtedly extend to ALJs as well.

If the dual-layer removal scheme were allowed to stand, the President would not be able to take action if the ALJ goes rogue and issues decisions inconsistent with the President's policy agenda. If the CFPB Director allows the ALJ's decisions to go into effect, the President's only option would be to fire the Director, but the ALJ would remain in her role. If the CFPB Director consistently overrules the ALJ's decisions because of such issues, then CFPB decisions would no longer be impartial and insulated from presidential policy — one of the key reasons to have the ALJ structure in the first place. *Sutherland*, 505 F.4th at 17. If the President wants the ALJ to be removed, at least two layers of for-cause protection stand in the President's way. *Jarkesy*, 34 F.4th at 465. Plus, according to the Twelfth Circuit, the ALJ cannot be removed for failure to

follow policy choices. *Sutherland,* 505 F.4th at 18-19. Such a situation could easily cause great embarrassment to the President. *Myers*, 272 U.S. at 121. Thus, to ensure that the President can take care that the laws are faithfully executed, this dual-layer removal scheme cannot stand.

CONCLUSION

Sutherland asks this Court to protect the American people from government overreach and to ensure that constitutional rights remain intact. To do so, the Court should recognize three key principles. First, the Seventh Amendment applies to claims with a common-law analog, which exists here. Second, the public rights exception does not apply to private rights nor to cases where the statutory scheme is indeed compatible with a jury trial. Third, dual-layer for-cause removal schemes unduly trammel the President's power and are unconstitutional. By reversing the Twelfth Circuit's opinion, this Court will preserve constitutional rights and ensure that everyone has access to their constitutionally mandated day in court.

Applicant Details

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Applicant Education

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Date of BA/BS	**May 2021**
JD/LLB From	**University of North Carolina School of Law** **https://law.unc.edu/**
Date of JD/LLB	**May 12, 2024**
Class Rank	**5%**
Law Review/Journal	**Yes**
Journal(s)	**First Amendment Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Holderness Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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12 June 2023

The Honorable Jamar K. Walker
Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

I am a rising third -year law student at the University of North Carolina School of Law, where I am currently ranked 9th out of 213 students, and am writing to apply for the position as your law clerk beginning in August of 2024.

My past experiences have prepared me well for the work in your chambers. As an intern last summer to Justices Ervin and Berger, I had the opportunity to develop my research and writing skills while drafting memoranda for petitions for discretionary review, bench briefs, and opinions. This past Fall, I had the opportunity to practice those skills in my Appellate Advocacy course, Moot Court, and UNC's Supreme Court Program. Through the Supreme Court Program and as a Research Assistant to Professor Hessick, I helped draft an Amicus Brief in *Moore v. Harper* (No. 21-1271), defending the decision on the merits and urging the US Supreme Court to reject the Independent State Legislature Theory on Federalism grounds, and a petition for writ of certiorari in *Lomax v. United States* (No. 22-644), urging the court to reconsider deference to the commentary on the United States Sentencing Guidelines in light of recent precedent. In addition, I was able to familiarize myself with class action practice and multi-district litigation through my Complex Civil Litigation class and am enrolled in Federal Jurisdiction in the Fall of 2023.

Attached are my resume, unofficial transcript, writing sample, and recommendations. Thank you for your time and consideration.

Sincerely,

David Woodlief

DAVID WOODLIEF

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EDUCATION

University of North Carolina School of Law, Chapel Hill, NC
Juris Doctor, expected May 2024
GPA: 3.916 (Rank 9/213), Merit Scholarship Recipient

- Articles Editor, *First Amendment Law Review*, Vol. 22; Staff Member, Vol. 21
- Holderness Moot Court Appellate Advocacy Team, Fall 2022-Current
- Vice President, Christian Legal Society, Fall 2022-Spring 2023
- Treasurer, Christian Legal Society, Spring 2022
- Eugene Gressman & Daniel H Pollitt Oral Advocacy Award, Spring 2022

University of North Carolina, Chapel Hill, NC
Bachelor of Arts in Economics and Political Science, Minor: Religious Studies, May 2021
GPA: 3.815, with Highest Distinction; Phi Beta Kappa

- Pi Sigma Alpha (Political Science Honor Society)
- Staff Writer, *Carolina Political Review*, political and legal issues journal

EXPERIENCE

Phelps Dunbar, LLP, Raleigh, NC
Summer Associate, July-August 2023

Alston & Bird, LLP, Raleigh, NC
Summer Associate, May-June 2023

Professor F. Andrew Hessick, University of North Carolina School of Law, Chapel Hill, NC
Research Assistant, Spring 2022

- Aided in preparing the petition for writ of certiorari in *United States v. Lomax*, 22-644
- Performed general research tasks

Hon. Phil Berger, Jr., Associate Justice, North Carolina Supreme Court, Raleigh, NC
Judicial Intern, June-July 2022

- Prepared bench briefs, a memo outlining the merits of a habeas petition, and an opinion
- First place in joint Supreme Court-Court of Appeals Moot Court Competition

Hon. Samuel J. Ervin, IV, Associate Justice, North Carolina Supreme Court, Raleigh, NC
Judicial Intern, May-June 2022

- Prepared memos outlining the merits of petitions for discretionary review and a bench brief
- Participated in the drafting of an opinion
- Discussed cases with Justice Ervin and clerks; observed oral arguments

Hon. L. Patrick Auld, Magistrate Judge, U.S. District Court (M.D.N.C.), Greensboro, NC
Shadowing, July 2021

- Researched the CDC eviction moratorium
- Observed court before Judge Auld and U.S. District Court Judges the Hon. Catherine C. Eagles, the Hon. N. Carlton Tilley, Jr., and the Hon. William L. Osteen, Jr.

LANGUAGES, & INTERESTS

Languages: Low/Intermediate proficiency in Dutch, elementary proficiency in Biblical Hebrew and Sahidic Coptic
Interests: Fantasy and thriller fiction; a variety of podcasts; model building; Eagle Scout Troop 103

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Unofficial Transcript

Note to Employers from the Career Development Office: Grades at the UNC School of Law are awarded in the form of letters (A, A-, B+, B-, C, etc.). Each letter grade is associated with a number (A = 4.0, A- = 3.7, B+ = 3.3, B = 3.0, etc.) for purposes of calculating a cumulative GPA. An A+ may be awarded in exceptional situations. For more information on the grading system, including the current class rank cutoffs, please contact the Career Development Office at (919) 962-8102 or visit our website at https://law.unc.edu/careers/for-employers/grading-policy-faq/

Student Name: David Woodlief

Cumulative GPA: 3.916

Course	Description	Term	Grade	Units
LAW 426	COMPLEX CIVIL LITIGATION	2023 Spring	A	3.00
LAW 335	ADV TORTS: BUS TORTS/PROD LIAB	2023 Spring	A	3.00
LAW 242	EVIDENCE	2023 Spring	A	4.00
LAW 228	BUSI ASSOCIATIONS	2023 Spring	A	4.00
LAW 563	APPELLATE ADV. COMPETITION LAB	2023 Spring	PS	1.00
LAW 234F	FIRST AMENDMENT	2022 Fall	A	3.00
LAW 336	APPELLATE ADVOCACY	2022 Fall	A	3.00
LAW 311	SUPREME COURT PROGRAM	2022 Fall	A	3.00
LAW 266	PROF RESPONSIBILITY	2022 Fall	A	2.00
LAW 275	SECURED TRANSACTIONS	2022 Fall	A	3.00
LAW 234A	CONSTITUTIONAL LAW	2022 Spring	A	4.00
LAW 296	RES,REAS,WRIT,ADVOC II	2022 Spring	A	3.00
LAW 205	CRIMINAL LAW	2022 Spring	A	4.00
LAW 207	PROPERTY	2022 Spring	A-	4.00

LAW 204	CONTRACTS	2021 Fall	A	4.00
LAW 201	CIVIL PROCEDURE	2021 Fall	A	4.00
LAW 295	RES,REAS,WRIT,ADVOC I	2021 Fall	A-	3.00
LAW 209	TORTS	2021 Fall	B+	4.00

GPA Calculation		
Total Grade Points	56.000	227.100
/ Units Taken Toward GPA	14.000	58.000
= GPA	**4.000**	**3.916**

June 07, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I understand that my former student David Woodlief is applying for a position in your chambers. I have had the good fortune to teach David twice: as a second semester 1L in my legal research, writing, and advocacy class; and the fall 2022 semester in my upper-level Appellate Advocacy class. He was outstanding in both courses, and he's a delight to know outside of the classroom. I couldn't possibly recommend him more highly.

First, as is immediately evident from his resumé, David excels academically. His GPA puts him very near the top of a class that is, by most metrics, the strongest that UNC Law has produced in the twelve years I've been teaching here. This academic strength has borne itself out in my two classes with David. He got A's in both—one of two students in the legal writing class and one of three in Appellate Ad—and in both, he demonstrated fantastic legal writing skills. But even more than his writing ability, it's David's research that always stands out to me. Of the hundreds of students whom I've taught here at UNC, David is the most curious and interested in the law. Every time I assigned a research assignment, he came back with more law than I had found in preparing the problem. And it was not because he went down unhelpful rabbit holes; he just refused to leave any stone unturned. For instance, in his final brief in Appellate Ad, he found all of the binding Fourth Circuit law; but he also found many more on-point cases from other circuits around the country. Maybe more impressively, he was able to deploy those cases in his brief in a way that I, as a judge, would know that they were non-binding but would still find them relevant and persuasive.

Perhaps because of that curiosity, David is on the short list of best advocates that I've ever taught at UNC. The second-semester 1L legal writing course is an advocacy class, as, of course, is Appellate Ad. Both classes require multiple written briefs and one graded oral argument. Most students struggle—especially as 1Ls—to understand what it means to be persuasive. Not David. He is that incredibly rare student who can argue his position but who could also, at the drop of a hat, turn around and argue the opposing position. To that end, he is absolutely one of the five best oral advocates I've worked with at UNC.

Finally, David would be an excellent addition to any workplace. He gets along with everyone, is a pleasure to talk to, and has a great sense of humor. More than that, I think that David is particularly suited to a judge's chambers. He just cares about the law in a way that very few students do. One final example: when I taught him as a 1L, the class's longest writing assignment was a problem on the Armed Career Criminals Act, and particularly what constitutes "separate occasions" under that statute. In the first session after I assigned the case file, David came up to me and asked, "Did you base this on *U.S. v. Woodson*?" I hadn't, and indeed didn't know anything about *U.S. v. Woodson*, a case dealing with the exact issue from our case file. David informed me that the Supreme Court had just heard arguments on the case the week before, and he had heard about it on a podcast and then read up on the issue. (My memory is that he read the briefs on the case; I can't say for sure that that's true, but the fact that I believe he might have says plenty about David's approach to the law.)

Ultimately, I have taught very few (if any) students who I think are better fits to be in a judge's chambers than David. I am happy to recommend him unreservedly. Please let me know if I can provide any more information for you.

With every good wish, I am

Sincerely,

Luke H. Everett
Clinical Professor
UNC School of Law
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Sam J. Ervin, IV
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517 Lenoir Street
Morganton, North Carolina 28655
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E-Mail Address: ervingarden@bellsouth.net
March 7, 2023

Re: David Woodlief

Dear Sir or Madam:

I understand that David Woodlief, who is expected to graduate from the University of North Carolina Law School in May 2024, is seeking employment in your chambers. I am writing to you for the purpose of providing you with the benefit of the insights that I developed concerning Mr. Woodlief in the hope that it will assist you in your selection process.

As his resume reflects, Mr. Woodlief served as an unpaid intern in my chambers at the Supreme Court of North Carolina in May and June of 2022. During that time, Mr. Woodlief appears to have participated in the drafting of a portion of an opinion, prepared multiple bench briefs for my use in preparing for oral argument and the casting of a preliminary vote concerning the manner in which the cases in question should be decided, and drafted memoranda discussing the extent to which the Court should grant or deny petitions seeking discretionary review of lower court decisions or other forms of relief in which the assigned justice is required to summarize the facts of the case, the substance of the underlying decision, and the arguments that the parties advanced for and against the allowance of the petition and to make a recommendation concerning the manner in which the petition should be disposed of. During my time at the Supreme Court, my practice was to simply review bench briefs with the clerk or intern who prepared the initial draft and to electronically edit draft opinions or petition memoranda in order to prepare a final version for circulation to the other members of the Court.

During his time in my chambers, Mr. Woodlief appeared to be very interested in the work of the Court, acted in a professional manner, and completed his work assignments quickly. According to one of my former law clerks, Mr. Woodlief had strong research and writing skills and invariably wanted to discuss the cases on which he had worked once they had been orally argued. The other former law clerk who worked with Mr. Woodlief described him as diligent and engaged, as having done quality work, and as having asked good questions when he thought that he needed help. My personal recollection is that the recommendations that Mr. Woodlief provided me with were soundly reasoned and that the draft documents that he prepared for my use could be converted into an opinion or memorandum that could be disseminated to the other members of the Court without an unusual amount of effort on my part. In addition, Mr. Woodlief got along well with me and the other members of my staff, worked hard, and struck me as a serious person with a deep interest in the judicial system who has a bright future in the legal profession. All in all, Mr. Woodlief served effectively in my chambers and we both enjoyed and appreciated having had the benefit of his assistance during the time that he was with us.

Thanks very much for taking these thoughts into consideration. If you have any questions or would like to receive any additional information about Mr. Woodlief, please do not hesitate to let me know.

Sincerely,

Sam J. Ervin, IV

June 07, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to recommend David Woodlief for a clerkship in your chambers. Mr. Woodlief will be a top-flight clerk. He is diligent, hardworking, and smart, and he is an excellent writer.

I have had Mr. Woodlief in a number of classes, including Civil Procedure, Evidence, and the Supreme Court program. The first two classes—Civil Procedure and Evidence—are standard lecture classes, and while Mr. Woodlief was excellent in those classes, it was in the Supreme Court program that his talents became apparent. That program entails representing actual clients before the U.S. Supreme Court. The students assist in identifying potential cases in which to seek review, developing litigation strategies, and writing briefs. Mr. Woodlief was outstanding in the class. He quickly grasped the nuances of when a case is cert worthy and how to frame arguments attractive to the Court. More important, his brief writing was excellent; he is a natural.

Mr. Woodlief's outstanding work in the Supreme Court program prompted me to hire him as a research assistant. The principal project on which Mr. Woodlief helped involved identifying various arguments made during the debates at the original Constitutional Convention. As always, his work was top notch. Not only was the work well written and reasoned; the comprehensiveness of the research also demonstrated his tenacity and attention to detail.

Mr. Woodlief will be an outstanding clerk. I unhesitatingly recommend him. If you have any questions, please do not hesitate to call me at (919) 962-4332.

Sincerely,

F. Andrew Hessick

Andrew Hessick - ahessick@email.unc.edu

DAVID WOODLIEF

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This brief is a modified version of the final graded assignment in my Fall 2022 appellate advocacy course. The submitted draft was compliant with the Federal Rules of Appellate Procedure, but only the Statement of the Issues, Statement of the Case, and Argument are included for length. The work is my own and was not substantially edited by others.

The assigned problem was a real case out of the Eastern District of North Carolina which the parties resolved pending appeal. The defendant and his codefendant were spotted late at night in a closed business park by Apex Police, who followed a short distance to a gas station. At the gas station the police spoke with the defendant, took his license, and parked behind his car. During the encounter an officer spotted a machete and the police searched the car, turning up illegally possessed mail. The district court found that the Fourth Amendment was not implicated because the stop was consensual and, if it were not, the officers had reasonable suspicion to seize the defendant. The issue on appeal is whether the defendant was seized and, if so, whether there was reasonable suspicion to support that seizure.

STATEMENT OF THE ISSUES

IA. Whether the trial court erred when it determined Mr. Lane was not seized, finding that a reasonable person would feel free to leave when the police tailed his car, "partially blocked" it, took his license, and discussed in his presence that he was a suspect.

IB. Whether the trial court erred when it determined that the police had reasonable suspicion to seize Mr. Lane where an officer observed him driving at night, without stopping, through a closed business park where the officer was aware of previous criminal activity, and Mr. Lane "accelerated," without committing any traffic violations, such that an officer thought he was "trying to get away," even though he stopped at a gas station shortly thereafter and willingly spoke with the officer.

STATEMENT OF THE CASE

At 12:51 a.m. on a Monday, Corporal Deborah Hansen of the Apex Police department was patrolling the Pinnacle Park area, "a spot where crimes had occurred . . . , making sure nothing happened." (J.A. 42-43) "Being that there was no traffic" and that all the businesses in the area were closed, when she spotted a car "driving slowly" on Pinnacle Park's main roads, Reliance Road and Classic Road, she "thought [she] would follow [the car], see what they were doing." (J.A. 43) The car "didn't pull in any kind of businesses like [it] w[as] looking for anyplace, [it] just drove out of the area towards the stop sign" at Lufkin Road, which is a small road leading back to the main thoroughfares of Ten-Ten Road, East Williams Street, and interchanges for U.S. 1. (J.A. 43-44) Neither of the car's occupants got out of the car, and Corporal Hansen readily acknowledged that she "never saw any illegal activity of any kind." (J.A. 61)

The car turned right, heading back towards Ten-Ten Road and a Sheetz gas station. (J.A. 44) Corporal Hansen wrote in her incident report that when it did so, the driver "accelerated quickly as if he was attempting to get away from [her]." (J.A. 15) At the suppression hearing she testified that she was close enough to "see the taillights of the car," trailing less than two tenths of a mile behind, and "felt like it was obvious that [the driver] had seen [her] because he had been generally going slow and then he quickly took off . . . like he was trying to maybe not be in this area because [she] was there." (J.A. 44, 62) When the car turned, Corporal Hansen was still driving on Classic Road, where the speed limit is twenty-five miles per hour, and she observed the car accelerate from a full stop to the thirty-five mile per hour speed limit on Lufkin Road. (J.A. 60-63) The car never violated any traffic laws, and Corporal Hansen suggested that if it had, by failing to stop at the sign for instance, she would have pulled the car over. (J.A. 62)

After turning, the car drove six-tenths of a mile down Lufkin Road and stopped at the Sheetz just before Ten-Ten Road. (J.A. 45) Her interest piqued, Corporal Hansen "pulled to the very far right of the parking lot . . . so [the car] could back out . . . if [the driver] wanted to" and "called into communications" to advise them of the situation. (J.A. 45) She then intercepted the driver, Jimmy Cecil Lane, Jr., as he walked to the front door of the Sheetz. (J.A. 46) His passenger had already made his way inside. (J.A. 46)

Corporal Hansen called out to him "[d]o you mind if I talk to you?" to which Mr. Lane responded "yeah," before the two walked towards each other and met, "kind of like a mutual joining." (J.A. 46) Corporal Hansen asked him where he and his passenger were from, to which Mr. Lane responded they were from Fayetteville. (J.A. 46) She wrote in her incident report that Mr. Lane said that they were "visiting girls" and testified that he said they were "looking for girls." (J.A. 15, 46, 71-73)

Corporal Hansen then asked Mr. Lane whether he had a valid driver's license. (J.A. 47) Mr. Lane responded that he did, and went to retrieve it, spending "about a minute" looking through the glove box. (J.A. 47) When he remembered he had put it in his wallet, he produced a temporary paper license, which he gave to Corporal Hansen. (J.A. 47)

Almost simultaneously, Officers Ashley Boyd and D. Warren arrived in their marked patrol car. (J.A. 48) Officer Warren parked the car with the nose to the rear of Mr. Lane's with, in Officer Boyd's estimation, "a distance you could walk in between [the] two vehicles." (J.A. 90) According to Officer Boyd, the patrol car "partially blocked" Mr. Lane's car such that "maybe Mr. Lane could have backed up[,] but he would have had to do some maneuvering to do so." (J.A. 97) Corporal Hansen told Officers Warren and Boyd that Mr. Lane's passenger was in the store and told Officer Boyd to "standby with Mr. Lane so [she] could check" Mr. Lane's license. (J.A. 49) She directed Officer Warren to "keep an eye" on the passenger. (J.A. 76)

Corporal Hansen began to walk back to her patrol car, but "then [she] quickly turn[ed] around" and "c[ame] back to [her] fellow officers" to say "this [sic] may be the suspects from the other night." (J.A. 76-77) She then returned to her car to check Mr. Lane's license. (J.A. 49) While she was doing so, Officer Boyd walked back to her car carrying a machete, which he said was concealed in Mr. Lane's car. (J.A. 51)

While the officers discussed whether or not they should arrest Mr. Lane for carrying the machete, Officer Boyd told Corporal Hansen "I don't care either way. It just depends on if you want to have something to take them to jail for." (J.A. 85) Corporal Hansen replied that "the reason I was going to take him to jail was because . . . when he comes here to Apex, he's from Fayetteville, he has no reason to be here, and you know he's stealing. I know that was the description I seen somewhere on the bulletin." (J.A. 86) Officer Boyd mentioned a bulletin that

did not match Mr. Lane's description, and Corporal Hansen said to "just take him to jail anyway so he knows if he comes to Apex and gets caught, we're taking him to jail." (J.A. 86) At the suppression hearing, Corporal Hansen acknowledged that she could never "recall exactly what any bulletin said with respect to Mr. Lane." (J.A. 86)

The officers arrested Mr. Lane on suspicion of driving while his license was revoked and for possession of a concealed weapon. (J.A. 53) When the officers searched Mr. Lanes' car, they discovered pieces of mail addressed to commercial businesses. (J.A. 92-93)

Based on that evidence, a grand jury indicted Mr. Lane and his passenger for one count of possession of stolen mail and aiding and abetting the same in violation of 18 U.S.C §§ 1708 and 2 and for one count of obstructing correspondence and aiding and abetting the same in violation of 18 U.S.C §§ 1702 and 2. (J.A. 2) Mr. Lane moved to suppress the evidence presented against him as the fruit of an unlawful search in violation of the Fourth Amendment. (J.A. 3)

A full hearing was conducted, after which the trial court issued an order denying Mr. Lane's motion. (J.A. 134) The court found that the Fourth Amendment was not implicated by the interaction because the encounter was consensual and the officers did not engage in a show of authority that would cause a reasonable person to believe he was not free to leave. (J.A. 141-142) Further, the court held that even if a seizure had occurred, it was justified by reasonable suspicion since "Corporal Hansen observed [Mr.] Lane's car traveling slowly at 12:51 a.m., the middle of the night on a weekday, in Pinnacle Park . . . [when] [n]one of the businesses . . . were open," "Corporal Hansen was aware there had been crime in the Pinnacle Park area," and "[w]hen Corporal Hansen got behind [Mr.] Lane, he accelerated quickly, as if he was trying to get away from Corporal Hansen." (J.A. 143) Given this, the trial court held that once Officer Boyd observed the machete, the officers had probable cause to search Mr. Lane's car. (J.A. 143)

After the motion to suppress was denied, Mr. Lane pleaded guilty, reserving his right to appeal. (J.A. 146, 149)

ARGUMENT

I. The Apex Police performed an unconstitutional search after seizing Mr. Lane without reasonable suspicion; thus, the exclusionary rule and the right it vindicates require that the evidence obtained thereby be suppressed.

The Fourth Amendment protects "the right of the people to be secure . . . against unreasonable searches and seizures." U.S. Const., amend. IV. "[N]o right is held more sacred, or is more carefully guarded than the right of every individual to the possession and control of his own person, free from all restraint or interference . . . ." *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (internal quotation marks omitted).

To that end, law enforcement's "authority to initiate an encounter with a citizen is no greater than the authority of an ordinary citizen to approach another on the street and ask questions." *United States v. Jones*, 678 F.3d 293, 299 (4th Cir. 2012) (cleaned up)). When police go further and " 'by means of physical force or show of authority . . . in some way restrain[] the liberty of a citizen' " a seizure occurs, and the Fourth Amendment is implicated. *Id.* (quoting *Terry*, 392 U.S. at 19 n. 16). Such a seizure requires reasonable suspicion in the form of "a particularized and objective basis for suspecting the particular person [seized] of criminal activity." *Navarette v. California*, 572 U.S. 393, 396 (2014) (internal quotation marks omitted). Evidence obtained in violation of the Fourth Amendment must be suppressed under the exclusionary rule. *See Mapp v. Ohio*, 367 U.S. 643, 655 (1961); *United States v. Andrews*, 744 F.3d 231, 235 (4th Cir. 2009).

Here, three members of the Apex police department blocked Mr. Lane's car into a parking spot and took his license. The lead officer asked the other officers to watch Mr. Lane and to "keep an eye" on his passenger before saying, in Mr. Lane's presence, that he might be a "suspect." The

officers did not act as any other citizen might, but limited Mr. Lane's freedom of movement, demonstrated their authority, and clearly stated that he was under investigation; they transformed an otherwise permissible interaction into a seizure. When they did so, they did not have reasonable suspicion of ongoing criminal activity committed by Mr. Lane; thus, the evidence obtained thereafter was obtained in violation of the Fourth Amendment and must be suppressed as fruit of the poisonous tree.

A. Mr. Lane was seized by the Apex police, as no reasonable person who is conspicuously followed, has his vehicle blocked in when reinforcements arrive, has his license taken, hears that he is a suspect, and is placed under observation would feel free to terminate his encounter with the police.

Standard of Review

The " 'reasonable person' standard" used to determine whether an individual is seized "is an objective one, [and] thus its proper application is a question of law," which this court reviews *de novo*. *Jones*, 678 F.3d at 299 (internal citation and quotation marks omitted); *United States v. Bowman*, 884 F.3d 200, 212 (4th Cir. 2018).

Argument

A seizure occurs when " 'in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.' " *United States v. Gray*, 883 F.2d 320, 322 (4th Cir. 1989) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (plurality opinion)).[1]

[1] In cases where the defendant attempts to resist a seizure, a further inquiry is made as to when the defendant acquiesced to law enforcement's authority. *See United States v. Stover*, 808 F.3d 991, 995-96 (4th Cir. 2015) (stating "When submission to police authority is disputed, a court must also ascertain whether and when the subject of the seizure actually acquiesced to that authority."). Here, neither the government nor the trial court questioned, when accepting *arguendo* that a seizure had occurred, that Mr. Lane acquiesced. Nor could they, as passively standing by constitutes acquiescence in this and most instances. *See Brendlin v. California*, 551 U.S. 249, 255, 261-62 (2007) (holding that by remaining stationary during traffic stop, vehicle passenger acquiesced); *United States v. Black*, 707 F.3d 531, 537-38 (4th Cir. 2012) (ignoring the second factor where the defendant did not seek to leave the scene until well after seizure).

The test does not require law enforcement to engage in a great show of force. *See Gray*, 883 F.2d 320, 322 (4th Cir. 1989) (stating "an individual need not be held at gunpoint" (internal quotation marks and alteration omitted)). Nor does it require that law enforcement engage in overtly intimidating or coercive conduct; it is sufficient that non-coercive or intimidating factors cause a "suspect to believe he cannot decline an officer's requests or otherwise terminate [an] encounter." *Bowman*, 884 F.3d at 212.

To that end, the court reviews a number of factors to determine whether an individual is seized: (1) "the number of police officers present"; (2) whether the police officers were uniformed or displayed their weapons; (3) whether the officer touched the defendant, physically restrained his movement, or blocked his departure; (4) "whether the officer's questioning was 'conversational' rather than 'intimidating' "; (5) whether the officer "treat[ed] the encounter as 'routine' in nature" rather than "inform[ing] the defendant that he positively suspected him of illegal activity"; and (6) whether the officer "promptly returned" any requested identification or other document necessary for travel. *Gray*, 883 F.2d 320, 322-23 (4th Cir. 1989); *United States v. Cloud*, 994 F.3d 233, 242-43 (4th Cir. 2021); *Jones*, 678 F.3d at 299-300; *United States v. Black*, 707 F.3d 531, 537-38 (4th Cir. 2012).

With regard to the first and second factors, an increase in the number of officers over the course of an encounter communicates a show of authority that weighs in favor of finding a seizure. *Cf. Black*, 707 F.3d at 538 (finding that "the collective show of authority by the uniformed police officers" increased when "four uniformed police officers . . . quickly increased to six . . . then seven"). Similarly, where officers "perform perimeter duties, ensuring that no other individuals interrupt[] the police interaction and preventing people from leaving the vicinity," that weighs in favor of finding a seizure. *See id.*

The fourth and fifth factors do not require that law enforcement expressly communicate to an individual that he is under investigation or a suspect. *See Jones*, 678 F.3d at 300. Rather, if the suspect can easily gather from the officers' conduct that he is under investigation, that supports a finding that a seizure has occurred. *See id.* For instance, where an "encounter . . . beg[ins] with a citizen knowing that the police were conspicuously following him, rather than . . . [by] being approached by officers seemingly at random," that communicates suspicion and weighs in favor of a seizure. *Id.*

The third and sixth factors, physical restraint and the retention of travel documents, deserve great weight because they not only communicate to a reasonable person that they are not free to leave, but actually impede the person's ability to leave. *See id.*; *United States v. Weaver*, 282 F.3d 302, 310-11 (4th Cir. 2002).

Where an individual travels by automobile and is not situated as a pedestrian, the retention of his license forces him "to choose between the Scylla of consent to the encounter or the Charybdis of driving away and risk[ing] being cited for driving without a license." *Weaver*, 282 F.3d at 311. This effects a seizure because that is, "of course, no choice at all." *Id.*[2] A retention does not occur when an officer remains in the presence of the defendant and is reasonably diligent in checking the validity of a license. *See United States v. Analla*, 975 F.2d 119, 124 (4th Cir. 1992) (finding no seizure where the officer "did not take the license into his squad car, but instead stood beside the car, near [the defendant]" and checked its validity without delay). But when the officer

[2] That law enforcement's retention of important travel documents, such as plane tickets and licenses, effects a seizure is an almost unanimous position. 4 Wayne R. LaFave, *Search & Seizure* § 9.4(a) n. 96 (6th ed. 2022) (collecting cases). Some courts insist that a seizure occurs the moment the officer obtains the license, regardless of how long they possess it. *Id.*; *see, e.g.*, *United States v. Guerrero*, 472 F.3d 784, 786 (10th Cir. 2007) ("But once the officers take possession of [the] license, the encounter morphs into a detention.").

leaves the presence of a person, such that he is not "free at [that] point to request that his license . . . be returned," or where the officer is not reasonably diligent, a seizure occurs. *See id.*; *see also*, *Keller v. State*, 169 P.3d 867, 870 (Wyo. 2007) (finding a seizure during an otherwise consensual encounter when the officer "took [the suspects'] driver's licenses and walked back to his patrol vehicle for records checks"); *cf. United States v. Sharpe*, 470 U.S. 675, 687 (1985) (holding that even when a seizure is justified, it becomes unconstitutional when extended because law enforcement did not diligently perform its investigation).

"[W]hen an officer blocks a defendant's car from leaving the scene . . . the officer demonstrates a greater show of authority than does an officer who just happens to be on the scene and engages a citizen in conversation," and effects a seizure. *Jones*, 678 F.3d at 300-302; *United States v. Watkins*, 816 Fed.Appx. 821, 825 (4th Cir. 2020) (unpublished) (stating "when an officer has used his cruiser to physically block a suspect's vehicle from leaving, the suspect is seized"). This is true even if the defendant's car is only partially blocked, so long as the officer's vehicle impedes the car's movement or makes it more difficult to navigate an exit. *See Jones*, 678 F.3d at 297, 302. In *Jones*, for instance, this Court found the defendant was seized and his car was "block[ed]" even though he had "the option of 'back[ing] [his] vehicle back up' the one-way driveway going in the 'wrong direction.' " *Id.* (alteration in original). This is consistent with the holdings of other courts, which have found seizures where a patrol car's placement would have forced the defendant to engage in "a number of turns" or "maneuver" around the police. *United States v. Delaney*, 955 F.3d 1077, 1082-83 (D.C. Cir. 2020) (holding that when the police park in such a way that "the [defendant] would have had to execute 'a number of turns . . . to get out of the parking lot.' . . . [that is] highly suggestive of a [seizure]."); *State v. Jestice*, 861 A.2d 1060, 1062-63 (Vt. 2004) (holding that "the fact that it was possible for the [defendants] to back up and

maneuver their car past the patrol car" does not change the fact that "park[ing] nose-to-nose with the [defendants'] car" effectively seized them).

In Mr. Lane's case, all but one of the factors this Court relies on suggest that a seizure occurred. Particularly, the retention of Mr. Lane's license and the placement of Officer Warren and Officer Boyd's patrol car, which blocked the movement of Mr. Lane's car, make clear that he was seized; no reasonable person in his situation would have believed they were free to go.

Three uniformed officers were present, all of whom arrived in marked patrol cars. Further weighing in favor of a seizure, the show of force increased as the encounter continued, with the number of officers increasing from one to three, and the officers "perform[ing] perimeter duties" when they were told to "keep an eye" on Mr. Lane and his passenger.

None of the officers treated the encounter as "routine," but "informed [Mr. Lane] that he [was] positively suspected of criminal activity." Corporal Hansen wrote in her incident report that Mr. Lane "accelerated quickly as [i]f he was attempting to get away from [her]." That inferential leap only makes sense if Corporal Hansen were in fact "conspicuously following" Mr. Lane before the encounter, and Corporal Hansen testified that she thought she had been spotted. Even if the beginning of the encounter did not communicate that Mr. Lane was "positively suspected of criminal activity," Corporal Hansen and Officer Warren discussed, in Mr. Lane's presence, that "this [sic] may be the suspects from the other night," which clearly communicates he is suspected of criminal activity.

Mr. Lane was travelling by automobile, and thus Corporal Hansen effected a seizure when she did not "promptly return" his driver's license. Indeed, Mr. Lane's license was never returned. Corporal Hansen walked to her car and away from Mr. Lane to check his license, rather than remaining in his presence and performing the check by radio. Mr. Lane was no longer "free at

[that] point to request that his license . . . be returned," especially since Corporal Hansen had directed Officer Warren to watch him. Nor was Corporal Hansen reasonably diligent in completing her check of Mr. Lane's license. She returned to her vehicle to do so but "quickly turn[ed] around" and "c[ame] back to [her] fellow officers" for an unnecessary colloquy about Mr. Lane's status as a suspect before she undertook that effort. Corporal Hansen put Mr. Lane to an impossible choice "between the Scylla of consent to the encounter [and] the Charybdis of driving away and risk[ing] being cited for driving without a license." When she did so, she seized him.

Officers Boyd and Warren also effected a seizure when they blocked Mr. Lane's car, which physically restrained his movement and blocked his departure. Officer Warren parked his patrol car with the nose to the rear of Mr. Lane's, while Mr. Lane was in a parking spot, with just enough room "you could walk . . . between [the] two vehicles." Officer Boyd recognized that they had parked very close to Mr. Lane and acknowledged that the car was "partially blocked" such that it might be possible for Mr. Lane to back up "but [that] he would have had to do some maneuvering to do so." That Mr. Lane "could have backed up" by engaging in difficult "maneuvering" is immaterial, just as the defendant's ability in *Jones* to drive the wrong direction, in reverse, down a one-way road was immaterial. The impediment to movement effects a seizure regardless by "demonstrat[ing] a greater show of authority than . . . an officer who just happens to be on the scene and engages a citizen in conversation."

The only factor that counts in favor of the government is that the initial questioning by Corporal Hansen seems " 'conversational' rather than 'intimidating.' " But officers do not need to use overt intimidation to effect a seizure, and such a miniscule consideration cannot overcome the weight of the other factors. A reasonable person who is conspicuously followed by police, whose vehicle is blocked in when more officers arrive at the scene, whose license is taken out of

his presence and never returned, who overhears that he is a "suspect," and who has law enforcement "keep an eye" on him and his passenger would not feel that he is free to leave, regardless of how "conversational" the police were. Mr. Lane was seized for purposes of the Fourth Amendment, if not earlier, when Corporal Hansen told Officer Warren that Mr. Lane was a suspect and then walked off with his license, before the machete was found.

B. The officers lacked reasonable suspicion to seize Mr. Lane, as the factors cited by the trial court only give rise to a hunch of ongoing criminal activity and are susceptible to many innocent explanations.

Standard of Review

This court "appl[ies] a *de novo* standard of review to a district court's determination that an officer had reasonable suspicion," but reviews factual determinations for clear error, viewing the evidence in the light most favorable to the government. *Bowman*, 884 F.3d at 209.

Argument

For a seizure to be legal, " 'law enforcement officers must reasonably suspect that [the individual seized] is engaged in, or poised to commit, a criminal act *at that moment*.' " *United States v. Wilson*, 953 F.2d 116, 125 (4th Cir. 1991) (quoting *United States v. Sokolow*, 490 U.S. 1, 12 (1989) (Marshall, J., dissenting)) (emphasis original to *Sokolow*).

"[T]he concept of reasonable suspicion is somewhat abstract," and the courts have "deliberately avoided reducing it to a neat set of legal rules." *United States v. Arvizu*, 534 U.S. 266, 274 (2002). However, the government must, at minimum, be able to articulate "a particularized and objective basis for suspecting that the [defendant]" is engaged in or poised to commit a criminal act. *See Wilson*, 953 F.2d at 125; *United States v. Powell*, 666 F.3d 180, 185-86 (4th Cir. 2011). To prove that basis, the government may only rely upon the facts known to the officers on scene. *Powell*, 666 F.3d at 186. An " 'inchoate and unparticularized suspicion or hunch' " is never enough. *Id.* (quoting *Sockolow*, 490 U.S. at 7).

The government's asserted basis is judged against "a commonsense, nontechnical standard that deals with the factual and legal considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Bowman*, 884 F.3d at 213 (cleaned up). To that end, the standard is "cognizant of both context and the particular experience of the officers" on the scene. *United States v. Branch*, 537 F.3d 328, 337 (4th Cir. 2008). But instead of broad deference, this Court has taken the government's past propensity to "spin . . . largely mundane acts into a web of deception" and the fact that "the exclusionary rule is [the courts'] sole means of ensuring that police refrain from engaging in the unwarranted harassment or unlawful seizure of anyone" as reason for skepticism. *See United States v. Foster*, 634 F.3d 243, 248-49 (4th Cir. 2011); *United States v. Black*, 707 F.3d 531, 539 (4th Cir. 2013) (stating "at least four times in 2011 we admonished against the Government's misuse of innocent facts as indicia of suspicious activity"); *cf. United States v. Williams*, 808 F.3d 238, 243-44, 253 (4th Cir. 2015) (noting a similar sentiment and recounting that the trial court had to remove one of the factors supporting reasonable suspicion in its order after "*Brady* material . . . directly contradicted [an officer]'s [testimony] at the initial hearing.").

The government and officers must be put to the test, as otherwise "an experienced police officer's recitation of some facts followed simply by a legal catchphrase, would allow the infringement of individual rights with impunity." *Williams*, 808 F.3d at 253. "[A]n officer and the Government" cannot "simply label a behavior as 'suspicious' to make it so." *Foster*, 634 F.3d 243, 248 (4th Cir. 2008). Rather, the government and officers have an obligation "to either articulate why a particular behavior is suspicious or logically demonstrate, given the surrounding circumstances, that the behavior is likely to be indicative of some more sinister activity than may appear at first glance." *Id.*; *Cf. Williams*, 808 F.3d at 252-53 (stating that the fact that "[t]he

deputies neither articulated how [the defendant]'s particular behavior was suspicious nor logically demonstrated that his behavior was indicative of some more sinister activity" is fatal to the government's case). Where the reasoning employed is "absurd," it can be rejected outright, *see Digiovanni*, 650 F.3d at 512, and, even where it is not, if "there are an infinite number of reasonable explanations, unrelated to any criminal behavior" to explain a fact this court has been "extremely wary of accepting" that fact as indicative of reasonable suspicion, *Foster*, 643 F.3d at 247-49.

Even if the circumstances are suspicious, the government must cross a second threshold before it can prove an officer possessed reasonable suspicion; it must show that "the articulated factors together . . . eliminate a substantial portion of innocent" citizens. *See United States v. Foreman*, 369 F.3d 776, 781 (4th Cir. 2004).

Before considering whether the totality of the circumstances provides reasonable suspicion, each indicium should be viewed in isolation to determine whether it indicates criminality. *See United States v. Slocumb*, 804 F.3d 677, 682 (4th Cir. 2015). Here, the trial court relied on (1) the fact that Mr. Lane was "traveling slowly at 12:51, the middle of the night, on a weekday in Pinnacle Park . . . [while] [n]one of the businesses were open," where "Corporal Hansen was aware there had been crime," and (2) that "[w]hen Corporal Hansen got behind Lane, he accelerated quickly, as if he was trying to get away from Corporal Hansen."

(1) Mr. Lane's presence in Pinnacle Park at night, where previous crimes had been reported, while the businesses were closed, is unparticularized and does not give rise to reasonable suspicion.

While the defendant's presence in a "high-crime area, the lateness of the hour, and the fact that [a] business [the defendant is outside of] ha[s] been closed for many hours . . . can contribute to a finding of reasonable suspicion" they are of minimal value. *Slocumb*, 804 F.3d at 682. The factors "do little to support the claimed particularized suspicion as to [the defendant]." *Id.* (internal quotation marks and alterations omitted).

Here, Mr. Lane's presence in an area of closed businesses at night, where an officer is aware of previous criminal activity, is unparticularized and at best minimally suspicious. In addition, while it may seem self-evident what Corporal Hansen's suspicions were, she did not meet the required threshold of "articulat[ing] why [Mr. Lane's] particular behavior is suspicious." She merely observed that the businesses in the area were closed, that the vehicle was "driving slowly," and that "[she] thought [she] would follow this person, see what they were doing."

That Corporal Hansen failed to articulate and explain her suspicion is of particular import because Mr. Lane's presence is not susceptible only to nefarious explanation, but to "an infinite number of reasonable explanations, unrelated to criminal behavior." Given that, even if Corporal Hansen had explained her suspicion, Mr. Lane's presence would be of little weight. The conduct that Corporal Hansen observed, driving through Pinnacle Park late at night without stopping, is the same thing any innocent person who missed his turn into the Sheetz might do, using the Reliance Avenue to Lufkin Road-loop rather than drive further and then backtrack. Setting that likely explanation aside, Mr. Lane's presence in Pinnacle Park could be no more nefarious than a confused out-of-towner misunderstanding the directions he and his passenger were given or needing to turn around after a missed turn or wrong exit, considering the proximity to U.S. 1.

Given that Mr. Lane's driving through Pinnacle Park is minimally suspicious at best—being unparticularized to Mr. Lane—that Corporal Hansen failed to explain why it was suspicious, and that it is susceptible to a plethora of reasonable, innocent explanations, this court should reject it as a factor supporting reasonable suspicion.

(2) <u>It does not provide reasonable suspicion that when "Corporal Hansen got behind [Mr.] Lane, he accelerated quickly," as his behavior is not actually evasive.</u>

"Where a defendant did not try to flee or leave the area," evasion may only support a finding of "reasonable suspicion on a showing of more 'extreme' or unusual nervousness or acts

of evasion." *Slocumb*, 804 F.3d at 683. And where a defendant is cooperative with law enforcement, such as by "voluntarily paus[ing] to speak with [law enforcement] upon [an] officer's request," that undercuts a suggestion that his conduct was evasive. *Cf. Massenburg*, 654 F.3d at 482 (stating "the men were not evasive; they . . . voluntarily paused to speak with the officer upon the officer's request. In fact, they were cooperative . . . .").

For evasion to exist, the defendant's conduct must suggest that he "is not going about [his] business, but instead . . . that [he] is avoiding [law enforcement] for other than innocent reasons." *See United States v. Smith*, 396 F.3d 579, 584 (4th Cir. 2005) (internal citations and quotation marks omitted). Prototypical cases involve a defendant who confronts the police head-on, such as in a police roadblock or when they are actively approaching, and then takes steps to avoid an interaction. *Id.* (collecting cases).

For instance, in *United States v. Sims,* this Court found reasonable suspicion for a stop and frisk in part based on evasive conduct where the defendant " 'jerk[ed] right back' " when officers "found [him] behind a house, 'crouching' and 'peeking around the corner,' " from where he had been observing officers search a nearby alley. 196 F.3d 284, 286-87 (4th Cir. 2002) (alteration in original). And in *United States v. Brugal*, this Court found reasonable suspicion for a traffic stop in part based on evasion where the defendant "exited Interstate 95 after passing two well-lit decoy drug checkpoint signs" onto an exit that "showed no signs of activity at [that late hour]" after he had just passed another exit "with several well-lit twenty-four hour gas stations." 209 F.3d 353, 359-60 (4th Cir. 2000) (en banc) (plurality opinion).

In *United States v. Sprinkle*, by contrast, this court rejected the government's argument that when the driver "started his car and pulled from the curb right after the officers walked by" he engaged in evasive conduct that supported a finding of reasonable suspicion. 106 F.3d 613, 618

(4th Cir. 1997). The court said that "driving away in a normal, unhurried fashion, [does not] lend itself to a finding of reasonable suspicion" because mere departure from a scene is not flight. *Id.* at 618.

Here, any attempt to characterize Mr. Lane's "acceleration" as "evasive" overtaxes the word. Mr. Lane did not "try to flee" or "leave the area." He drove six tenths of a mile to a Sheetz gas station—never returning to a main road—in an "unhurried fashion," obeying the speed limit at all times. Once he arrived, Corporal Hansen approached him and he "voluntarily paused to speak with" her upon her request, significantly undercutting any suggestion of evasion.

Unlike the evasive conduct credited by this court in *Brugal* and *Sims*, Mr. Lane's conduct is fully consistent with "going about one's business." Corporal Hansen readily admits that Mr. Lane did not break any traffic laws—or else she would have pulled him over; she only faults him for accelerating from zero miles per hour to thirty-five miles per hour more quickly than she would have liked, as judged from her vantage point travelling only twenty-five miles per hour. Corporal Hansen has "simply label[ed]" Mr. Lane's driving habits "suspicious" with the barest assertion that he was "attempting to get away from [her]," employing a "legal catchphrase" in the manner *Williams* cautions against. Corporal Hansen has not demonstrated that Mr. Lane's acceleration was suspicious, nor was it.

* * *

While "factors 'susceptible to innocent explanation' individually may 'suffice to form a particularized and objective basis' when taken together," such factors, taken together, must be damningly suspicious to support reasonable suspicion. *See Slocumb*, 804 F.3d at 682 (quoting *United States v. Arvizu*, 534 U.S. 266, 277 (2002) (alterations omitted)).

For instance, in *Walker v. Donahue*, this Court found that a seizure was supported by reasonable suspicion where the detainee possessed an AR-15, a school shooting had recently been in the news, the detainee was walking near a school, and the detainee was wearing a black shirt and camouflage pants. *See* 3 F.4th 676, 685-86 (4th Cir. 2021). All of the factors taken individually were legal and susceptible to innocent explanation, but taken together and against the backdrop of a recent school shooting, the court reasoned that the officer was justifiably suspicious of a potential copycat crime. *Id.*

In *Slocumb*, by contrast, this Court found a plethora of largely innocent factors insufficient to find reasonable suspicion. 804 F.3d at 684. There, the government relied on five factors: (1) that the officers were aware of the high-crime nature of the area; (2) the lateness of the hour; (3) that the defendant was in the parking lot of a commercial business that had been closed for several hours; (4) that the defendant was evasive, appearing to hurry his partner, avoiding eye-contact, and giving low, mumbled responses; (5) and that his presence "seemed 'inconsistent' with his explanation for his presence." *Id.* at 682. The court found that the time of day, high-crime nature of the area, and presence near a closed business were of vanishingly little value, being unparticularized to the defendant, and that the supposed "evasive" behavior cited by the officers was not the type credited by this court as suspicious. *Id.* Instead, the defendant's "presence in the parking lot and the activity accompanying it" were "seemingly innocent acts" which, "[v]iewed in their totality . . . [did] not amount to reasonable suspicion." *Id.* at 684.

Here, the factors found by the district court fall far short of those described in *Walker* and mirror those rejected in *Slocumb*. As in *Slocumb*, the government places heavy reliance on the lateness of the hour, Mr. Lane's presence outside of closed businesses, and previous criminal activity in the area, which are unparticularized to Mr. Lane and susceptible to innocent

explanations. Similarly, the government attempts to characterize Mr. Lane's "acceleration" as evasive even though, as demonstrated above, it, like the defendant's conduct in *Slocumb*, does not rise to the level of evasion credited by this court as suspicious. Mr. Lane's presence in Pinnacle Park and the accompanying activity, both seemingly innocent acts, do not amount to reasonable suspicion when viewed in their totality.

The officers had, at most, "an inchoate and unparticularized hunch" that Mr. Lane was involved in criminal activity. Their seizure of Mr. Lane was unjustified by reasonable suspicion and violated his Fourth Amendment rights.

C. Because Mr. Lane was seized without probable cause, any evidence obtained from that seizure must be suppressed under the exclusionary rule.

Standard of Review

"In reviewing the denial of a motion to suppress the appellate court reviews the legal conclusions *de novo* and factual findings for clear error." *United States v. Pulley*, 987 F.3d 370, 376 (4th Cir. 2021).

Argument

The evidence obtained after Mr. Lane was seized was obtained in violation of the Fourth Amendment. It is well established that "evidence seized during an unlawful search [cannot] constitute proof against the victim of the search." *Wong Sun v. United States*, 371 U.S. 471, 485 (1963). The only way that evidence can be used is if it is obtained from an independent source or "the connection between the lawless conduct of the police and the discovery of the challenged evidence has become so attenuated as to dissipate the taint." *Id.* at 487 (internal citations and quotation marks omitted).

Here, there is no independent source and no attenuation between the illegal seizure of Mr. Lane and the discovery of his machete or the mail in his possession. Therefore, the mail must be suppressed.

Applicant Details

First Name	**Daniel**
Middle Initial	**W.**
Last Name	**Xu**
Citizenship Status	**U. S. Citizen**
Email Address	**daniel.xu@emory.edu**
Address	**Address** Street **1084 Mill Field Ct.** City **Great Falls** State/Territory **Virginia** Zip **22066** Country **United States**
Contact Phone Number	**7036063450**

Applicant Education

BA/BS From	**College of William and Mary**
Date of BA/BS	**May 2021**
JD/LLB From	**Emory University School of Law** **https://law.emory.edu/index.html**
Date of JD/LLB	**May 7, 2024**
Class Rank	**10%**
Law Review/Journal	**Yes**
Journal(s)	**Emory Law Journal**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Hawkins, Haley
haley_hawkins@dcd.uscourts.gov
Kirk, Aaron
akirk@emory.edu
Smith, Fred
fred.smith@emory.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Daniel W. Xu
1084 Mill Field Ct.
Great Falls, VA 22066
daniel.xu@emory.edu
(703) 606-3450

May 30, 2023

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, Virginia 23510

Dear Judge Walker:

I am a rising third-year student at the Emory University School of Law, and am writing to apply for a clerkship in your chambers for the 2024–2025 term. I am eager to return home to Virginia, where I grew up and intend to practice as a civil rights attorney.

While in law school, I have developed strong legal research and writing skills—producing a student comment that will be published in the *Emory Law Journal*, submitting written advocacy to the Alabama Parole Board, and drafting memoranda for the U.S. District Court for the District of Columbia and the U.S. Court of Appeals for the Eleventh Circuit. In each instance, I received praise for my thorough research, clear prose, and robust analysis. As such, I am confident in my ability to succeed as a law clerk.

My desire to clerk is driven by a deep belief in public service. Through my externships and volunteer work, I have seen the tangible effects that our legal system can have on individuals and their communities. These experiences have reinforced my decision to pursue a public interest career. Serving as your clerk would allow me to gain insight on the role of courts in promoting fairness and justice, enabling me to be a more effective advocate in the future.

I have enclosed my resume, writing sample, law school transcript, and three letters of recommendation. The Honorable Jill A. Pryor, U.S. Circuit Judge for the Eleventh Circuit Court of Appeals, and her career law clerk, Elizabeth Eager, have also agreed to serve as references for my application. They can both be reached at (404) 335-6525. If you have any questions, or should you need any additional materials, I can be contacted at (703) 606-3450 or daniel.xu@emory.edu. Thank you for your consideration.

Respectfully,

Daniel W. Xu

Enclosures

DANIEL W. XU

1084 Mill Field Ct., Great Falls, VA 22066
703-606-3450 | daniel.xu@emory.edu

EDUCATION

Emory University School of Law — **Atlanta, GA**
J.D. Candidate — May 2024

- GPA: 3.775 (Top 10%)
- Journal: *Articles Editor*, Emory Law Journal. Selected for publication in Volume 73 (forthcoming 2024)
- Awards: Justice John Paul Stevens Public Interest Fellow, Dean's List (all semesters)
- Activities: Civil Rights Society, American Constitution Society, Asian Pacific American Law Student Association, Emory Public Interest Committee, Morningside House Coordinator, DeKalb County Election Clerk

The College of William & Mary — **Williamsburg, VA**
B.A. in Public Policy, Minor in Economics — May 2021

- Activities: *Fellow*, D.C. Institute for American Politics; *President*, Kappa Delta Rho Fraternity; Orientation Aide; *Residential Program Assistant*, National Institute of American History & Democracy

EXPERIENCE

Federal Defender Program, Inc. — **Atlanta, GA**
Selected as a Fall 2023 Legal Extern — August 2023 – November 2023

ACLU of the District of Columbia — **Washington, D.C.**
Legal Intern — May 2023 – Present

- Researched and drafted memoranda on issues related to the Americans with Disabilities Act and Rehabilitation Act

U.S. Court of Appeals for the Eleventh Circuit — **Atlanta, GA**
Judicial Extern for the Honorable Jill A. Pryor — January 2023 – April 2023

- Researched and drafted bench memoranda and opinions for cases on appeal before the Court
- Observed oral arguments before three-judge panels, as well as rehearings en banc
- Assisted chambers by writing case summaries and literature reviews

Southern Center for Human Rights — **Atlanta, GA**
Legal Extern — September 2022 – November 2022

- Advocated for a client, under attorney supervision, before the Alabama Board of Pardons and Paroles. Spoke with them in prison, conducted family interviews, and delivered oral and written testimony in support of their release
- Investigated juror information for a *Batson* challenge against a prosecutor's preemptory strikes
- Researched recent capital murder dispositions as part of an effort to negotiate a favorable plea bargain

U.S. District Court for the District of Columbia — **Washington, D.C.**
Judicial Intern for the Honorable Reggie B. Walton — May 2022 – July 2022

- Researched and drafted memorandum opinions resolving 12(b)(1) and 12(b)(6) motions to dismiss
- Proofread documents and citations written by clerks, court attorneys, and other interns
- Observed jury trials, motion hearings, re-entry progress hearings, and other court proceedings

Emory LGBTQ+ Legal Services Clinic — **Atlanta, GA**
Clinic Volunteer — October 2021 – May 2022

- Examined state-level approaches to conversion therapy regulation. Reviewed how states and circuits addressed marriage equality prior to *Obergefell v. Hodges*. Analyzed cases, state constitutions, and state statutes

Chicago Justice Project — **Chicago, IL**
Open Cities Project Remote Volunteer — October 2021 – December 2021

- Researched and drafted legal memoranda on public information laws and the availability of police accountability data

Emory Public Interest Committee — **Atlanta, GA**
"Know Your Rights" Volunteer — September 2021 – May 2022

- Instructed high school students about their rights and responsibilities during encounters with law enforcement officers

ICF International, Inc. (ICF) — **Fairfax, VA**
Workforce Innovations and Poverty Solutions (WIPS) Intern — June 2020 – August 2020

- Compiled, organized, and visualized data for federal contract reports
- Drafted literature reviews on community victimization, social determinants of health, and workforce readiness

ADDITIONAL INFORMATION

Fluent Mandarin speaker. Former competitive chess player (USCF 1631). Avid Washington Wizards fan.

Advising Document - Do Not Disseminate

Name: **Daniel Xu**
Student ID: **2537607**

Institution Info: Emory University
Student Address: 1084 Mill Field Ct
Great Falls, VA 22066-1868
Print Date: 05/16/2023

Beginning of Academic Record

Fall 2021

Program: Doctor of Law
Plan: Law Major

Course		Description	Attempted	Earned	Grade	Points
LAW	505	Civil Procedure	4.000	4.000	A-	14.800
LAW	510	Legislation/Regulation	2.000	2.000	A-	7.400
LAW	520	Contracts	4.000	4.000	A-	14.800
LAW	535A	Intro.Lgl Anlys, Rsrch & Comm	2.000	2.000	A	8.000
LAW	550	Torts	4.000	4.000	B+	13.200
LAW	599A	Professionalism Program	0.000	0.000	S	0.000
LAW	599B	Career Strategy & Design	0.000	0.000	S	0.000

			Attempted	Earned	GPA Units	Points
Term GPA	3.638	Term Totals	16.000	16.000	16.000	58.200
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	3.638	Comb Totals	16.000	16.000	16.000	58.200
Cum GPA	3.638	Cum Totals	16.000	16.000	16.000	58.200
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.638	Comb Totals	16.000	16.000	16.000	58.200

Spring 2022

Program: Doctor of Law
Plan: Law Major

Course		Description	Attempted	Earned	Grade	Points
LAW	525	Criminal Law	3.000	3.000	A	12.000
LAW	530	Constitutional Law I	4.000	4.000	A	16.000
LAW	535B	Introduction to Legal Advocacy	2.000	2.000	A	8.000
LAW	545	Property	4.000	4.000	A	16.000
LAW	599A	Professionalism Program	0.000	0.000	S	0.000
LAW	701	Administrative Law	3.000	3.000	B+	9.900

			Attempted	Earned	GPA Units	Points
Term GPA	3.869	Term Totals	16.000	16.000	16.000	61.900
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	3.869	Comb Totals	16.000	16.000	16.000	61.900
Cum GPA	3.753	Cum Totals	32.000	32.000	32.000	120.100
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.753	Comb Totals	32.000	32.000	32.000	120.100

Fall 2022

Program: Doctor of Law
Plan: Law Major

Advising Document - Do Not Disseminate

Name: **Daniel Xu**
Student ID: **2537607**

Course		Description	Attempted	Earned	Grade	Points
LAW	669	Employment Discrimination	3.000	3.000	A	12.000
LAW	747	Legal Profession	3.000	3.000	B+	9.900
LAW	844A	Judicial Decision Making	3.000	3.000	A	12.000
LAW	870A	EXTERN: Public Interest	1.000	1.000	S	0.000
LAW	871	Extern: Fieldwork	2.000	2.000	S	0.000
Course Topic:		Fieldwork: 150 Hours (2 units)				

			Attempted	Earned	GPA Units	Points
Term GPA	3.767	Term Totals	12.000	12.000	9.000	33.900
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	3.767	Comb Totals	12.000	12.000	9.000	33.900
Cum GPA	3.756	Cum Totals	44.000	44.000	41.000	154.000
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.756	Comb Totals	44.000	44.000	41.000	154.000

Spring 2023

Program: Doctor of Law
Plan: Law Major

Course		Description	Attempted	Earned	Grade	Points
LAW	632X	Evidence	3.000	3.000	B+	9.900
LAW	671	Trial Techniques	2.000	2.000	S	0.000
LAW	721	Federal Courts	3.000	3.000	A	12.000
LAW	729X	State Constitutional Law	2.000	2.000	A	8.000
LAW	870E	EXTERN: Judicial	1.000	1.000	S	0.000
LAW	871	Extern: Fieldwork	2.000	2.000	S	0.000
LAW	885	Emory Law Journal:Second Year	2.000	2.000	A+	8.600

			Attempted	Earned	GPA Units	Points
Term GPA	3.850	Term Totals	15.000	15.000	10.000	38.500
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	3.850	Comb Totals	15.000	15.000	10.000	38.500
Cum GPA	3.775	Cum Totals	59.000	59.000	51.000	192.500
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.775	Comb Totals	59.000	59.000	51.000	192.500

Fall 2023

Program: Doctor of Law
Plan: Law Major

Course		Description	Attempted	Earned	Grade	Points
LAW	622A	Const'lCrim.Proc:Investigation	3.000	0.000		0.000
LAW	635	Child Welfare Law and Policy	2.000	0.000		0.000
LAW	675	Constitutional Lit	3.000	0.000		0.000
LAW	731L	Crimmigration	2.000	0.000		0.000
LAW	860A	Colloquium Series Workshop	2.000	0.000		0.000
LAW	870I	EXTERN: Advanced	1.000	0.000		0.000
LAW	871	Extern: Fieldwork	2.000	0.000		0.000

			Attempted	Earned	GPA Units	Points
Term GPA	0.000	Term Totals	15.000	0.000	0.000	0.000
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	0.000	Comb Totals	15.000	0.000	0.000	0.000

Advising Document - Do Not Disseminate

Name: **Daniel Xu**
Student ID: **2537607**

Cum GPA	3.775	Cum Totals	74.000	59.000	51.000	192.500
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.775	Comb Totals	74.000	59.000	51.000	192.500

Law Career Totals

Cum GPA:	3.775	Cum Totals	74.000	59.000	51.000	192.500
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.775	Comb Totals	74.000	59.000	51.000	192.500

End of Advising Document - Do Not Disseminate

United States District Court
for the District of Columbia
Washington, D.C. 20001

Chambers of
Reggie B. Walton
United States District Judge

October 14, 2022

Dear Judge:

I write to enthusiastically recommend Daniel Xu for a clerkship in your chambers. I currently serve as a law clerk to the Honorable Reggie B. Walton of the United States District Court for the District of Columbia.

Daniel served as one of nine interns in Judge Walton's chambers during the summer of 2022, and was a stand-out, both in terms of his work product and engagement as part of our chambers community. Interns for Judge Walton are responsible for drafting substantive writing assignments resolving pending motions in active cases before Judge Walton, including memorandum opinions, orders, and bench memoranda; editing and Bluebooking opinions and orders drafted by Judge Walton's clerks; and attending Judge Walton's hearings.

As Daniel's supervisor, I found that his work to be very strong. For his main substantive assignment, he prepared a memorandum opinion resolving a pending motion to dismiss in a civil case. This assignment required significant research skills, analysis, and critical thinking on Daniel's part, as it presented a novel issue over which there is currently a circuit split and no clear D.C. Circuit precedent. Daniel not only met, but exceeded, this challenge. His research was thorough, and his draft was well-constructed and required fewer edits than I would normally give to an intern. Throughout this assignment, Daniel took the initiative to set up in-person meetings with me to orally discuss his research findings and the progress of his assignment, demonstrating effective communication skills. These conversations with Daniel reminded me of the collaborative conversations I often have with my co-clerks—conversations which I have found to be an essential part of a well-functioning chambers environment.

Additionally, Daniel is a pleasant and friendly person. He took the initiative to get to know Judge Walton and his law clerks on a personal level and was well-liked in chambers. I have no doubt that Daniel's capacity for critical thinking, strong writing and research skills, and collegiality would make him a valuable addition to any chambers. I would be happy to discuss his qualifications in further detail and can be reached at (336) 404-2873.

Sincerely,

Haley Hawkins
Law Clerk to the Hon. Reggie B. Walton
Term: October 2021 to September 2023

June 9, 2023

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, Virginia 23510

Re: Clerkship Application of Daniel Xu

Dear Judge Walker:

I am writing with enthusiasm to recommend Daniel Xu for a clerkship. Daniel is an excellent student, legal analyst, and writer. I am confident that as a judicial clerk, he will apply his formidable skills with great success.

Daniel was a student in my Introduction to Legal Analysis, Research, and Communication course at Emory University School of Law during his first year in law school (the 2021 fall semester and the 2022 spring semester). My class is very writing intensive. In the fall semester, students write two memoranda based on state law issues. In the spring semester, they write an appellate brief based on an issue of federal law and participate in an oral argument exercise. Throughout the year, I review and provide feedback on multiple drafts of their written work and discuss their work with them individually.

I have taught law students for 15 years, and Daniel was one of my very best students. During the two semesters I taught him, Daniel's analysis consistently was clear eyed and his work product polished. He was writing at the level of a junior attorney by the middle of the fall semester.

In addition, Daniel was a pleasure to work with both in and outside of class. Daniel is very responsive to constructive criticism. I demand a lot from my students, and many become frustrated by my expectations. If Daniel ever was frustrated, he never showed it. To the contrary, he was a model of professionalism. I always looked forward to his visits during my office hours; Daniel is personable and engaging, and his views are insightful.

I have no doubt that Daniel will excel at any legal endeavor to which he applies his considerable skills, and I am confident that he will be an excellent judicial clerk after he graduates. I highly

EMORY
SCHOOL OF
LAW

recommend Daniel for a clerkship. Please feel free to contact me if you wish to discuss his candidacy.

Very truly yours,

Aaron R. Kirk
Professor of Practice, Introduction to Legal Analysis, Research, and Communication and Introduction to Legal Advocacy

EMORY LAW

Fred Smith, Jr.
Charles Howard Candler Professor of Law

June 9, 2023

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, Virginia 23510

Recommendation Letter for Daniel Xu

Dear Judge Walker:

It is my pleasure to recommend Daniel Xu—an exceptional student in Emory Law School's class of 2024— for a judicial clerkship. Over the past year, I have assessed Daniel's clerkship potential in three settings. First, he authored a substantial research paper that I supervised. Second, Daniel enrolled in a small, writing-intensive seminar that I co-taught. Third, I taught Daniel in Federal Courts. My resultant impression is that Daniel would make a first-rate clerk. Indeed, I have invited him to serve as my research assistant next year. He is brilliant, mature, inquisitive, and kind. Further, he writes with elegance, clarity, and sophistication. I recommend him enthusiastically.

I first encountered Daniel in the fall of his second year of law school, when he asked me to serve as his advisor for a research paper he was submitting to the Emory Law Journal. (Each year, students on the journal write and submit research papers for potential publication.) Daniel chose to write about state criminal liability for unconstitutional violence. Because he chose to write about state law rather than federal law, he had to carefully canvas relevant legal regimes in all fifty states. Moreover, he needed to identify trends and flaws in current doctrine as he developed a workable, balanced recommendation. I was impressed with his detailed research and careful analysis. Further, I appreciated how receptive he was to critical feedback. He genuinely welcomed the opportunity to work through potential gaps in his arguments as he edited the paper. That said, Daniel is no pushover. He defended his ideas where appropriate with well-reasoned arguments and data. It was no surprise to me at all that Emory Law Journal ultimately selected his piece of publication. I assigned the paper an A+.

The second setting in which I have gotten to know Daniel is a class called State Constitutional Law that I co-teach with a former Chief Justice of the Georgia Supreme Court. Eighteen students are enrolled in the class. All are expected to do fairly heavy reading and come

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to class prepared to carefully engage in discussions. Students also submit two required papers over the course of the semester. In this class, Daniel was one of the stars. It was genuinely a joy to call on him in class because I always knew his comments would be filled with non-obvious insights that meaningfully advanced the discussion. I learned a great deal from that commentary.

Moreover, Daniel authored two excellent papers for State Constitutional Law. The first paper was about educational adequacy requirements in state constitutions. In my written feedback to Daniel about the paper, I called it "thoughtful," "well-balanced," and "insightful." The second paper addressed the intersection of property rights and economic development. In my written feedback, I called it "excellent work," "well-reasoned," and "easy to follow. My colleague offered similarly high praise of both papers. Daniel was one of the few students in the course who received an A on both of the assigned papers. Ultimately, he earned an A in the course.

Another setting where I got to know Daniel was in Federal Courts during the second semester of his 2L year. That course covers topics that are central to any Article III clerkship: subject matter jurisdiction; appealability; justiciability; abstention; immunity; Congressional control of federal courts; and habeas. The habeas component of that course involves a deep dive into the most complex aspects of habeas: procedural default; second or successive petitions; retroactivity; deference to state court adjudications under 28 U.S.C. §2254(d); and exhaustion. Daniel's visits to office hours and his commentary in class showed careful engaged these complex doctrines. It was therefore not a surprise that of the 69 students who enrolled in Federal Courts, Daniel wrote the third best exam in the class. Accordingly, he earned an A. For context, Federal Courts consistently attracts the top students at Emory Law and, as such, it is exceptionally difficult to earn an A in that setting.

I hope this letter conveys my enthusiastic endorsement of this clerkship application. Daniel is going to make a formidable lawyer. As he begins that path, any chambers would be fortunate to have him as a clerk. He has a gift for seeing both the big picture and the details. He writes beautifully and clearly. And he is a pleasure with whom to work. If you have any further questions, please do not hesitate to contact me at 706-540-4525.

Best regards,

Fred Smith, Jr.

DANIEL W. XU
1084 Mill Field Ct., Great Falls, VA 22066 | 703-606-3450 | daniel.xu@emory.edu

WRITING SAMPLE

This memorandum opinion draft was researched and written during my summer internship in the Chambers of the Honorable Reggie B. Walton, United States District Judge for the District of Columbia. It is my original work, but reflects feedback from my supervising clerk. It has been redacted, condensed, and approved for use as a writing sample.

Written Summer 2022

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[redacted],	)	
Plaintiff,	)	
v.	)	Civil Action No. [redacted]
[redacted],	)	
Defendant.	)	

MEMORANDUM OPINION

The plaintiff, [redacted], brings this civil action against the defendant [redacted], asserting a violation of Title III of the Americans with Disabilities Act, 42 U.S.C. § 12181 et seq. ("ADA"). See Amended Complaint ("Am. Compl.") at 1, ¶¶ 7–14, ECF No. 32. Currently pending before the Court is the Defendant's Motion to Dismiss ("Def.'s Mot." or the "defendant's motion"), ECF No. 31. Upon careful consideration of the parties' submissions,[1] the Court concludes for the following reasons that it must grant the defendant's motion to dismiss to the extent that it seeks dismissal for failure to state a claim but deny it in all other respects.

I. BACKGROUND

A. Factual Background

The plaintiff initiated this civil action on August 11, 2020. See generally Compl. ¶ 18. The plaintiff resides in [redacted], and states that she is "an individual with disabilities as defined by the ADA." Am. Compl. ¶ 1. She requires various accommodations because she is "unable to . . . walk[] more than a few steps without assistive devices[,] . . . is bound to . . . a wheelchair[,] . . . and has limited use of her hands." Id. The defendant owns a "place of public accommodation . . . known as [redacted][,]" located on [redacted] in Washington, D.C. (the "hotel"), id. ¶ 2, and utilizes an online reservations system ("ORS" or "websites") so that "members of the public may reserve guest accommodations and review

[1] In addition to the filings already identified, the Court considered the following submissions in rendering its decision: (1) the plaintiff's original Complaint ("Compl."), ECF No. 2; (2) the plaintiff's Statement Made Pursuant to 28 U.S.C. Section 1746 ("Pl.'s Statement"), ECF No. 29-2; (3) the Defendant's Memorandum of Points and Authorities in Support of Motion to Dismiss ("Def.'s Mem."), ECF No. 31-1; (4) the Plaintiff's Memorandum in Opposition to Motion to Dismiss ("Pl.'s Opp'n"), ECF No. 33; (5) the Defendant's Supplemental Authority in Support of Motion to Dismiss ("Def.'s Suppl. Auth."), ECF No. 34; and (6) the Plaintiff's Response to Notice of Supplemental Authority ("Pl.'s Resp. Suppl. Auth."), ECF No. 35.

information pertaining to . . . [the] accommodations of the [hotel,]" id. ¶ 9. This ORS includes third-party websites such as booking.com, expedia.com, and priceline.com. See id. The defendant is being sued for alleged violations of 28 C.F.R. § 36.302(e) and Title III of the ADA. See id. at 1, 11 ¶¶ 6–10, 13, 19, 22, 24.

This action is one of many similar lawsuits that have been initiated by the plaintiff around the country. See [redacted] v. [redacted], [redacted], [redacted] WL [redacted], at [redacted] (D. Md. [redacted]) ("In total, [the p]laintiff has filed at least 557 suits in sixteen different states, plus the District of Columbia."). The plaintiff identifies as a "tester" who files such actions "for the purpose of asserting her civil rights and . . . determining whether places of public accommodation . . . are in compliance with the ADA." Compl. ¶ 2. Despite the plaintiff's use "of nearly identically drafted [c]omplaints[,]" her lawsuits have generated inconsistent rulings, with "myriad decisions cutting both ways across the country." [redacted] v. [redacted], [redacted], [redacted] WL [redacted], at [redacted] (D. Md. [redacted]) (citation omitted). Notably, another member of this Court recently dismissed one of the plaintiff's lawsuits for lack of standing. See [redacted] v. [redacted], [redacted], [redacted] WL [redacted] (D.D.C. [redacted]), aff'd, [redacted], [redacted] WL [redacted] (D.C. Cir. [redacted]).

In the case currently before the Court, the plaintiff visited the defendant's ORS in July 2020 "for the purpose of reviewing and assessing the accessible features at the [hotel] and ascertain[ing] whether they met the requirements of [the ADA Regulation.]" Am. Compl. ¶ 10. She wanted to "ascertain[] whether or not she would be able to stay at the hotel[,]" as she "planned to travel to various states around the country, including Washington, D.C.[,] as soon as the [COVID-19] crisis abated[.]" Id. However, the plaintiff was unable to do so because the defendant's ORS "did not identify or allow for reservation of accessible guest rooms and did not provide sufficient information regarding accessibility at the hotel." Id. at ¶ 10.

In June 2021,[2] the plaintiff "again reviewed [the d]efendant's ORS and found that it still did not comply with the [ADA] Regulation[.]" Id. ¶ 13. She did so "for the purpose of planning her [upcoming] trip and ascertaining where on her trip she would be able to book an accessible room at an accessible hotel." Id. That summer,[3] the plaintiff traveled by car through Washington, D.C., and several other states (the "summer 2021 trip"). See id. While in Washington, D.C., she "needed a hotel to stay in[.]" Pl.'s Opp'n at 4. However, since the defendant's ORS did not contain accessibility information that was required by the ADA Regulation, the plaintiff alleges that she was unable to "ascertain[] whether . . . she would be

[2] There are inconsistencies in the plaintiff's filings about the timing of this ORS visit. In her Amended Complaint and Response to Supplemental Authority, the plaintiff states that she visited the ORS in June 2021. See Am. Compl. ¶ 13; Pl.'s Resp. Suppl. Auth. at 2. However, in her Opposition, she states that this occurred in August 2021. See Pl.'s Opp'n at 4. Based upon the temporal proximity of these inconsistencies, as well as the fact that these ORS visits occurred for the purpose of planning the same cross-country trip, the Court infers that these filings refer to the same incident. Accordingly, the Court will thereafter refer to this ORS visit as the "June 2021" visit.

[3] There are also inconsistencies in the plaintiff's filings about the month that this trip occurred. In her Amended Complaint, Response to Supplemental Authority, and Statement, the plaintiff states that this trip occurred in July 2021. See Am. Compl. ¶ 13; Pl.'s Resp. Suppl. Auth. at 2; Statement ¶ 2. However, in her Opposition, the plaintiff states that this trip occurred after she "reviewed the [defendant's] ORS in August 2021[.]" See Pl.'s Opp'n at 4. Based upon the temporal proximity of these dates, and the lack of indication that the plaintiff took multiple trips, the Court infers that these filings refer to the same trip. As such, the Court will refer to it as the "summer 2021 trip."

able to stay at the hotel during her trip[,]" Am. Compl. ¶ 10, and "deprived . . . of the ability to book an accessible room in the same manner as other non-disabled persons," Pl.'s Opp'n at 4. The plaintiff states that it was "extremely difficult to find hotels with accessible rooms" and that "there were occasions when [she] had to sleep in [her] car." Pl.'s Statement ¶ 4. The plaintiff further represents that she:

> intends that, in December 2022, she will again drive from Florida to such states as New York, Maine, etc. and will therefore drive through Washington, D.C., and will need hotels along her route to comply with the [ADA] Regulation so that she can have the information she needs to select a hotel and book a room

(the "December 2022 trip"). Am. Compl. ¶ 15. During this trip, the plaintiff "will . . . revisit[the defendant's ORS] when looking for a place to stay for the night." Pl.'s Statement ¶ 5.

B. Statutory Background [Section Omitted]

C. Procedural History [Section Omitted]

II. STANDARDS OF REVIEW [Section Omitted]

III. ANALYSIS

The plaintiff alleges that "[t]he violations present at [the d]efendant's websites . . . deprive her of the information required to make meaningful choices for travel . . . and [that she] continues to suffer frustration and humiliation as the result of [those] discriminatory conditions[.]" Am. Compl. ¶ 17. She states that these violations "contribute[] to [her] sense of isolation and segregation . . . and deprive[her] of [the] equality of opportunity offered to the general public." Id. She also alleges that the defendant's violations caused her "stigmatic injury and dignitary harm because it was difficult to find hotels in which to stay[.]" Id. ¶ 15. As a result, the plaintiff has requested declaratory and injunctive relief from the Court. Id. at 11.

The defendant seeks dismissal of the plaintiff's Amended Complaint under both Rule 12(b)(1) and Rule 12(b)(6) of the Federal Rules of Civil Procedure. See Def.'s Mot. at 1. First, the defendant argues that the plaintiff's Amended Complaint should be dismissed under Federal Rule of Civil Procedure 12(b)(1) because the "[p]laintiff does not have standing to bring this action." Def.'s Mem. at 4. Second, the defendant argues that the plaintiff's allegations "contain[] none of the essential facts required to state a claim[,]" and therefore, should be dismissed under Federal Rule of Civil Procedure 12(b)(6). Def.'s Mem. at 10–11.

Because a 12(b)(1) motion "presents a threshold challenge to [a] court's jurisdiction[,]" Haase, 835 F.2d at 906, and because a court "can proceed no further" if it lacks subject matter jurisdiction, Simpkins v. District of Columbia Gov't, 108 F.3d 366, 371 (D.C. Cir. 1997), the Court will only conduct a 12(b)(6) analysis after determining whether the plaintiff's case survives the defendant's initial 12(b)(1) claim. See Green v. Stuyvesant, 505 F. Supp. 2d 176, 177 n.2 (D.D.C. 2007) ("[D]ue to the resolution of the defendants' Rule 12(b)(1) request, the Court does not need to address . . . alternative grounds for dismissal at this time."); Al-Owhali v.

Ashcroft, 279 F. Supp. 2d 13, 20 (D.D.C. 2003) ("Although [the d]efendant states in his motion that he is seeking dismissal pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), dismissal, if warranted, could be entered solely on Rule 12(b)(1) grounds."). Accordingly, the Court will proceed by: (1) conducting a 12(b)(1) analysis to determine whether the plaintiff has established standing, and (2) conducting a 12(b)(6) analysis to determine whether the plaintiff has stated a claim upon which relief may be granted.

A. The Defendant's 12(b)(1) Motion to Dismiss

In seeking dismissal of the plaintiff's claim under Federal Rule of Civil Procedure 12(b)(1), the defendant asserts that the plaintiff "has not demonstrated that she suffered an actual and actionable injury that satisfies the standing requirements for subject matter jurisdiction." Def.'s Mem. at 5. The defendant argues that the plaintiff's allegations are "nothing more than mere conjecture and hypothetical injury[,]" id. at 6, as the plaintiff did not actually visit the defendant's hotel during her summer 2021 trip through Washington, D.C., and does not specifically intend to book a room there during her upcoming December 2022 trip, id. at 7. Furthermore, the defendant argues that the plaintiff has not "allege[d] any imminent injury as required to warrant injunctive relief." Def.'s Mem at 7.

In response, the plaintiff states that "[t]he facts set forth in [her Amended] Complaint . . . satisfy not only the [redacted] criteria" for establishing standing, "but also every negative decision in which a court imposed [an] intent-to-book criteria."[4] Pl.'s Opp'n at 4. The plaintiff argues that she has standing because she: (1) reviewed the defendant's ORS "for the purpose of ascertaining where she could stay during her [summer 2021] trip" through D.C.; (2) "traveled to . . . [D.C.] and needed a hotel to stay in;" (3) was "deprived . . . of the ability to book an accessible room in the same manner as other non-disabled persons;" (4) was "deprived of the information she required to make a meaningful choice in selecting a hotel in which to stay;" (5) has a definite intent to return to visit D.C. again in December 2022; and (6) will "again review [the d]efendant's ORS . . . for the purpose of ascertaining where she will be able to stay." See id.

Under Article III of the United States Constitution, federal courts are limited to adjudicating actual cases or controversies. See Honig v. Doe, 484 U.S. 305, 317 (1988). "In an attempt to give meaning to Article III's case-or-controversy requirement, the courts have developed a series of . . . 'justiciability doctrines,' among which [is] standing[.]" Nat'l Treasury Employees Union v. United States, 101 F.3d 1423, 1427 (D.C. Cir. 1996) (quoting Allen v. Wright, 468 U.S. 737, 750 (1984)). Indeed, "[s]tanding to sue is a doctrine rooted in the traditional understanding of a case or controversy[,] . . . limit[ing] the category of litigants

[4] The plaintiff does not specify what cases she is referring to. Instead, after referencing "every other negative decision" that utilized an "intent-to-book" criteria, the plaintiff states "See, e.g.[,]" without citing any sources for the Court to consider. See Pl.'s Opp'n at 4. As such, the Court is forced to assume that the plaintiff was alluding to the string of cases where, because of her lack of intent to actually book a stay at the property in question, she was denied standing to sue. See [redacted] v. [redacted], [redacted], [redacted] WL [redacted], at [redacted] (D. Colo. [redacted]) ("[redacted] alleged an information injury but did not allege what, if any, 'downstream consequences' she will face from the loss of information. She did not . . . intend[] to use the ORS . . . to book an accessible room."); see also [redacted] v. [redacted], 22 F.4th [redacted], [redacted] (10th Cir. [redacted]); [redacted] v. [redacted], [redacted], [redacted] WL [redacted] (D. Colo. [redacted]); [redacted] v. [redacted], [redacted], [redacted] WL [redacted] (D. Colo. [redacted]).

empowered to maintain a lawsuit in federal court to seek redress for a legal wrong." Spokeo, Inc. v. Robins, 578 U.S. 330, 338 (2016) (citation omitted). To establish Article III standing, the plaintiff must show (1) "that [s]he has suffered an injury in fact[;] . . . (2) that a causal connection exists between the injury and the conduct at issue, such that the injury is fairly traceable to the challenged conduct; and (3) that it is likely, not merely speculative, that the injury will be redressed by a decision in favor of the plaintiff." Jefferson v. Stinson Morrison Heckler LLP, 249 F. Supp. 3d 76, 80 (D.D.C. 2017) (citing Lujan, 504 U.S. at 560–61).

The defendant's 12(b)(1) motion to dismiss only contests the injury in fact requirement for Article III standing. See generally Def.'s Mem. "To establish [an] injury in fact, a plaintiff must show that . . . [he or she] suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" Spokeo, 578 U.S. at 339 (quoting Lujan, 504 U.S. at 560). Additionally, in an action seeking injunctive relief, "harm in the past . . . is not enough to establish[,] . . . in terms of standing, an injury in fact." Am. Soc'y for the Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus, 317 F.3d 334, 336 (D.C. Cir. 2003). "[A] party has standing . . . only if [he or she] alleges . . a real and immediate . . . threat of future injury." Nat. Res. Def. Council v. Pena, 147 F.3d 1012, 1022 (D.C. Cir. 1998).

"For an injury to be particularized, it must affect the plaintiff in a personal and individualized way." Spokeo, 578 U.S. at 339 (internal quotation marks omitted) (collecting cases). However, to constitute an injury in fact, that particularized injury must also be concrete. Id. For an injury to be "concrete," it must be "de facto" and actually exist. See id. at 340 (citing Black's Law Dictionary 479 (9th ed. 2009)). "'Concrete' is not, however, necessarily synonymous with 'tangible[,]' . . . [as] intangible injuries can nevertheless be concrete." Id.

In determining whether an intangible harm is concrete enough to constitute an injury in fact, "the judgement of Congress play[s an] important role[]." Id. "Congress may 'elevat[e] to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law.'" Id. at 341 (citing Lujan 504 U.S. at 578). For example, discriminatory treatment is often elevated in this way. See TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2205 (2021) (citing Allen, 468 U.S. at 757 n.22). Indeed, "[c]ourts must afford due respect to Congress'[s] decision to impose a statutory prohibition or obligation on a defendant, and to grant a plaintiff a cause of action to sue over the defendant's violation of that statutory prohibition or obligation." Id. at 2204 (citing Spokeo, 578 U.S. at 339). "But even though Congress may 'elevate' harms that 'exist' in the real world[,] . . . it may not simply enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is." Id. at 2205 (internal quotation marks omitted) (citation omitted).

However, "Article III standing requires a concrete injury even in the context of a statutory violation." Spokeo, 578 U.S. at 341. An "important difference exists between . . . a plaintiff's statutory cause of action to sue a defendant over the defendant's violation of federal law, and . . . a plaintiff's suffering concrete harm because of the defendant's violation of federal law." TransUnion, 141 S. Ct. at 2205. Therefore, an injury in law does not necessarily create injury in fact. See id. "Only those plaintiffs who have been concretely harmed by a defendant's statutory violation may sue that private defendant over that violation[.]" Id. (emphasis omitted).

In this case, the plaintiff alleges two intangible harms stemming from the defendant's statutory violation: first, an informational injury for being "deprived of the information she needed to make a meaningful choice in finding places in which to stay during her trip[,]" and second, a stigmatic injury because the defendant's violation made it "difficult to find hotels in which to stay, severely limited her options, and deprived her of full and equal access to the same goods and services enjoyed by non-disabled individuals[.]" Am. Compl. ¶ 13. The defendant contests the concreteness of these two injuries, and also challenges whether the plaintiff has "demonstrate[d] the 'imminent' future injury required for . . . injunctive relief[.]" Def.'s Mem at 6 (quotation omitted). As such, the Court will proceed with its analysis by determining: (1) whether the plaintiff's informational injury, as alleged, sufficiently constitutes an injury in fact, (2) whether the plaintiff's stigmatic injury, as alleged, sufficiently constitutes an injury in fact, and (3) because the Court ultimately concludes that the plaintiff has successfully alleged a stigmatic injury, whether the plaintiff has alleged the real and immediate threat of future injury needed to support standing for injunctive relief.

1. Informational Injury [Section Omitted]

2. Stigmatic Injury

Having established that the plaintiff's alleged informational injury is insufficient to confer standing, the Court will proceed with its analysis by addressing the plaintiff's contention that she suffered a stigmatic injury. See Am. Compl. ¶ 13. The plaintiff argues that the defendant, by omitting ADA-required accessibility information from its ORS, "contribute[d] to [the p]laintiff['s] sense of isolation and segregation[,] . . . deprive[d her] of the equality of opportunity offered to the general public[,]" id. ¶ 17, and caused her to experience "stigmatic injury and dignitary harm because it was difficult to find hotels in which to stay[,]" id. ¶ 13. In response, the defendant argues that the plaintiff could not have suffered such harms without actually intending to stay at the hotel, stating that the "[p]laintiff, somehow without even visiting [the hotel] or attempting to book a guest room, claims to have suffered 'frustration, increased difficulty, stigmatic injury, and dignitary harm.'" Def.'s Mem. at 5 (quotation omitted).

"'There is no doubt that dignitary harm is cognizable' because 'stigmatic injury is one of the most serious consequences of discrimination.'" [redacted], [redacted] WL [redacted], at [redacted] (quoting Carello v. Aurora Policemen Credit Union, 930 F.3d 830, 833–34 (7th. Cir. 2019)). Indeed, "discrimination itself, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as 'innately inferior' . . . can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group." Heckler v. Mathews, 465 U.S. 728, 729 (1984); see also Brintley v. Aeroquip Credit Union, 936 F.3d 489, 493–94 (6th Cir. 2019) ("It[is] true that 'dignitary harm' and 'stigmatic injury' might give rise to standing in some settings.").

However, "not all dignitary harms are sufficiently concrete to serve as injuries in fact." Griffin v. Dep't of Labor Fed. Credit Union, 912 F.3d 649, 654 (4th Cir. 2019). "While 'statutes may define what injuries are legally cognizable—including intangible or previously unrecognized harms'—they 'cannot dispense with the injury requirement altogether." [redacted], [redacted] WL [redacted], at [redacted] (quoting [redacted], [redacted] F.3d at [redacted]).

Consequently, "an 'abstract stigmatic injury,' standing alone, [is] not cognizable." Penkoski v. Bowser, 486 F. Supp. 3d 219, 228 (D.D.C. 2020) (quoting Allen, 468 U.S. at 755). A "plaintiff[must] show that they have been 'personally denied equal treatment by the challenged discriminatory conduct,' not just that they feel stigmatized." Penkoski, 486 F. Supp. 3d at 228 (emphasis omitted) (quoting Allen, 468 U.S. at 755); but see [redacted] v. [redacted], [redacted] F.4th [redacted], [redacted] (11th Cir. [redacted]) ("[While] a violation of an antidiscrimination law is not alone sufficient to constitute a concrete injury, . . . the emotional injury that results from [the] illegal discrimination is."). "The stigmatic injury thus requires the identification of some concrete interest with respect to which [a plaintiff is] personally subject to discriminatory treatment." Allen, 468 U.S. at 757 n.22.

Determining the level of concreteness required to support a stigmatic injury under Title III of the ADA "is, ultimately, an unsettled area of standing jurisprudence, with myriad decisions cutting both ways across the country." [redacted] v. [redacted], [redacted], [redacted] WL [redacted], at [redacted] (D. Md. [redacted]). While existing case law does not indicate the precise point at which an interest becomes concrete enough to support a stigmatic injury in fact, "[i]n many cases the . . . question can be answered chiefly by comparing the allegations of the particular complaint to those made in prior standing cases." Allen, 468 U.S. at 751–52. Accordingly, to determine whether the plaintiff has identified "some concrete interest" that was harmed by the defendant's alleged discrimination, the Court will proceed by comparing the facts of the current case to others that contain similar details and allegations.[5] See id. at 757 n.22.

First, the plaintiff alleges that she traveled to Washington, D.C., in summer 2021. See Am. Compl. ¶ 13. By visiting the city where the defendant's hotel was located, the plaintiff's allegations are already distinguishable from those in [redacted], where she failed to demonstrate "enough of a concrete interest" that was harmed by the defendant's ADA violation because she had not been to Washington, D.C., and "lack[ed] any allegations that she intend[ed] to visit [Washington, D.C.]" [redacted] WL [redacted], at [redacted]. Additionally, the plaintiff's allegations are distinguishable from those in [redacted] v. [redacted],[6] where she "failed to plead a concrete stigmatic or dignitary [injury]" even after alleging a visit to Eastern Colorado, the general region of the defendant's hotel. [redacted], [redacted] WL [redacted], at [redacted] (D. Colo. [redacted]). The U.S. District Court for the District of Colorado reasoned that "[Eastern Colorado] [wa]s a large swath of Colorado and could encompass numerous different places," and therefore, the plaintiff had "not alleged that she w[ould] or intend[ed] to travel to the location of the defendants' hotel[.]" Id. However, in the current case, the plaintiff traveled through "the specific [city] where [the d]efendants' hotel [was] located"—Washington, D.C. Cf. [redacted] WL

[5] Some of these cases were decided by district courts in other jurisdictions and are not binding on this Court. Nonetheless, due to their factual and legal similarities to the case at hand, as well as the shortage of analogous cases within the D.C. Circuit, this Court finds them instructive.

[6] [redacted], like the case currently before the Court, was stayed during the appeal of another of the plaintiff's suits, [redacted] v. [redacted], [redacted] F.4th [redacted], to the Tenth Circuit. See [redacted] WL [redacted], at [redacted]. When the Tenth Circuit affirmed the dismissal of [redacted] for lack of standing, the plaintiff motioned to file a supplemental complaint in [redacted], see id., just as she did when this Circuit affirmed the dismissal of [redacted], see generally Mot. File Suppl. Compl. However, in [redacted], the court denied her motion to file another complaint because her "proposed supplemental complaint [did] [not] remedy the defects in [her] original pleading." [redacted] WL [redacted], at [redacted].

[redacted], at [redacted] (holding that the plaintiff did not plead a concrete injury because she "d[id] not suggest an intent to visit the specific town where [the d]efendants' hotel [wa]s located").

Second, the plaintiff's intent to return to Washington, D.C., see Am. Compl. ¶ 15, is more concrete than it was in [redacted], [redacted] WL [redacted], at [redacted], and more geographically narrow than her intent to return to "Eastern Colorado" was in [redacted], [redacted] WL [redacted], at [redacted]. In [redacted], the plaintiff's "vague allegations" that she would visit Washington D.C. "as soon as the [COVID-19] crisis [was] over[,]" [redacted] WL [redacted], at [redacted], were too speculative and "undefined" to show standing, id. (citing [redacted], [redacted] WL [redacted], at [redacted]). In the current case, the plaintiff specifically alleges that "she will return to the [ORS] . . . and [Washington, D.C.,] . . . in December 2022," Am. Compl. ¶ 15, and provides a description of her plans to drive through the East Coast, see Statement ¶ 5. Moreover, unlike her plans in [redacted], the plaintiff intends to return to the "specific [city] where [the d]efendants' hotel is located[.]" Cf. [redacted] WL [redacted], at [redacted] (holding that the "[p]laintiff's did not allege that she would visit Byers, Colorado, the site of [the d]efendants' hotel," because she had only alleged that "she w[ould] travel to Eastern Colorado).

Third, unlike the scenario in [redacted] where she "visited the [defendant's ORS] to see if the [defendant] complied with the law, and nothing more[,]" [redacted] WL [redacted], at [redacted] (internal quotations omitted) (quoting [redacted], [redacted] F.3d at [redacted]), the plaintiff now alleges that she visited the defendant's ORS to "ascertain whether she would be able to stay at [the hotel,]" Am. Compl. ¶ 10. See also [redacted] v. [redacted], [redacted], [redacted] WL [redacted], at [redacted] (W.D. Tex. [redacted]) (quoting Brintley v. Aeroquip Credit Union, 936 F.3d 489, 494 (6th Cir. 2019)) ("[M]erely browsing the web, without more, is[not] enough to satisfy Article III."), report and recommendation adopted sub nom., [redacted], [redacted] WL [redacted] (W.D. Tex. [redacted]), aff'd sub nom., [redacted] Fed. App'x. [redacted] (5th Cir. [redacted]); [redacted], [redacted] F.4th at [redacted] ("[The plaintiff] has not alleged that she has any interest in using the . . . [defendant's] ORS beyond bringing [a] lawsuit."). Indeed, the plaintiff was not simply "surfing various websites in her home to check for ADA compliance[,]" [redacted], [redacted] WL [redacted], at [redacted], but rather, "intend[ed] to use the information to evaluate places to stay for a future trip[,]" [redacted] v. [redacted], [redacted], [redacted] WL [redacted], at [redacted] (W.D. Wis. [redacted]).

As such, the plaintiff did not merely "feel stigmatized" by the defendant's alleged ADA violation. See Penkoski, 486 F. Supp. 3d at 228 (emphasis removed) (citation omitted). Although she did experience "frustration and humiliation[,]" she contends that the defendant's noncompliant ORS harmed her in a more concrete way by "depriv[ing her of] the same advantages, privileges, goods, services and benefits readily available to the general public." Am. Compl. ¶ 17. Moreover, the plaintiff alleges that the defendant's ADA violation impaired her ability to "ascertain[] whether or not she would be able to stay at the hotel during her [upcoming] trip[,]" and made it "difficult to find hotels in which to stay." Id. ¶ 10. Indeed, when she traveled through Washington, D.C., "and needed a hotel to stay in[,]" she claims that "[the d]efendant's discriminatory ORS operated as a barrier . . . and deprived [her] of the ability to book an accessible room in the same manner as . . . non-disabled persons." Pl.'s Opp'n at 4. The plaintiff also states that it was "extremely difficult to find hotels with accessible rooms" and that "there were occasions when [she] had to sleep in [her] car." Statement ¶ 4. Thus, the

plaintiff's alleged stigmatic injury is not an "abstract" one that "stand[s] alone[.]" Penkoski, 486 F. Supp. 3d at 228 (quoting Allen, 468 U.S. at 755). Rather, it is accompanied by allegations of real-world harm to her ability to assess hotel options and book accessible rooms. Cf. [redacted], [redacted] WL [redacted], at [redacted] (conferring standing to a plaintiff as a result of the dignitary harm that stemmed from being unable to "evaluate places to stay for a future trip").

Therefore, the Court concludes that the plaintiff's inability to "ascertain[] whether or not she would be able to stay at the [defendant's] hotel[,]" Am. Compl. ¶ 10, combined with her visit to the specific city where the defendant's hotel was located, see [redacted], [redacted] WL [redacted]; [redacted], [redacted] WL [redacted], as well as her need to stay at a hotel in that specific city, see Am. Compl. ¶ 10, collectively constitute "some concrete interest" that was harmed by the defendant's ADA violation,[7] Allen, 468 U.S. at 757 n.22. The plaintiff's summer 2021 trip through Washington, D.C., created a particularized "connection between [the] plaintiff and [the] defendant . . . [that] separate[d] her from the general population visiting the [ORS,]" and as a result, the plaintiff suffered a concrete and particularized stigmatic injury in fact. [redacted], [redacted] WL [redacted], at [redacted]. Accordingly, the Court concludes that the "concrete interest" needed to support a stigmatic injury under the ADA does not necessarily require an intent to book. Allen, 468 U.S. at 757 n.22. As such, the plaintiff has established a stigmatic injury in fact.

3. Future Injury [Section Omitted]

B. The Defendant's 12(b)(6) Motion to Dismiss [Section Omitted]

IV. CONCLUSION

For the foregoing reasons, the Court concludes that it must grant the defendant's motion to dismiss to the extent that it seeks dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) but deny it in all other respects.

SO ORDERED this ___ day of ___, 2022.[8]

REGGIE B. WALTON
United States District Judge

[7] Admittedly, the plaintiff did not specifically visit the defendant's hotel or intend to book an accessible room there. See Def.'s Mem. at 5. However, the defendant's ADA violation "served as a barrier to this very event[,]" Pl.'s Opp'n at 2–3, preventing the plaintiff from ascertaining "whether the . . . hotel [was] accessible" enough for her specific needs in the first place. Am. Compl. ¶ 17. Moreover, the ADA Regulation specifically requires that hotel owners "[i]dentify and describe accessible features in the hotels and guest rooms offered through its reservations service in enough detail to reasonably permit individuals with disabilities to assess independently whether a given hotel or guest room meets his or her accessibility needs[.]" 28 C.F.R. § 36.302(e)(ii). Therefore, the Court concludes that an intent to book is not necessary for establishing a stigmatic injury.

[8] The Court will contemporaneously issue an Order consistent with this Memorandum Opinion.

Applicant Details

First Name	**Hamee**
Last Name	**Yong**
Citizenship Status	**U. S. Citizen**
Email Address	**hamee.yong.2024@lawmail.usc.edu**
Address	**Address** **Street** **9820 Exposition Blvd #304** **City** **Los Angeles** **State/Territory** **California** **Zip** **90034** **Country** **United States**
Contact Phone Number	**3127712832**

Applicant Education

BA/BS From	**University of Chicago**
Date of BA/BS	**June 2017**
JD/LLB From	**University of Southern California Law School** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=90513&yr=2009**
Date of JD/LLB	**May 10, 2024**
Class Rank	**15%**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/ Journal	**No**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Hale Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Armour, Jody
jarmour@law.usc.edu
(213) 740-2559

Craig, Robin
rcraig@law.usc.edu
(213) 821-8153

Garry, Hannah
hgarry@law.usc.edu
213-740-9154

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Hamee Yong

9820 Exposition Blvd., Apt. 304, Los Angeles, CA 90034 | hamee.yong.2024@lawmail.usc.edu | 312-771-2832

June 12, 2023

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker,

I am writing to apply for a 2024-2025 term clerkship in your chambers or any subsequent term thereafter. I am a rising third-year law student at the University of Southern California Gould School of Law. I grew up in three countries—South Korea, Singapore, and the U.S.—without being tied to one place, which allows great flexibility to relocate to Norfolk for a clerkship.

I entered law school to pursue indigent defense. As an aspiring public defender, I am keen on gaining unique insights into the role of advocacy in the judicial decision-making process. As a yearlong research assistant to Prof. Hannah Garry, I expanded my legal research skills by working on multiple databases and synthesizing wide-ranging literature in international refugee law and transitional justice. Before law school, I worked for four years as an investment banker and private equity investment associate in New York, conducting financial and operational due diligence on mid-market to multi-billion dollar enterprises. I believe such transactional experience would be an asset in your chambers when it comes to cases relating to securities and market transactions.

Enclosed please find a copy of my resume, my most recent transcript, and a writing sample. USC will submit letters of recommendation from Professor Hannah Garry, Professor Jody Armour, and Professor Robin Craig under separate cover. I would welcome the opportunity to interview with you. Thank you very much for your consideration.

Respectfully,

Hamee Yong

Enclosures

Hamee Yong

9820 Exposition Blvd., Apt. 304, Los Angeles, CA 90034 | hamee.yong.2024@lawmail.usc.edu | 312-771-2832

EDUCATION

University of Southern California Gould School of Law — **Los Angeles, CA**
Juris Doctor Candidate — *May 2024*
GPA: 3.79 (Class Rank forthcoming)
Honors: Hale Moot Court Honors Program; 2022 & 2023 Public Interest Summer Grant Recipient; 2023 FASPE (Fellowships at Auschwitz for the Study of Professional Ethics) Fellow; 2023-2024 American Association of Women Selected Professions Fellowship Recipient ($20,000)
Activities: Public Interest Law Foundation (Pro Bono Chair); International Refugee Assistance Project (President)

The University of Chicago — **Chicago, IL**
Bachelor of Arts in Economics with Honors; Minor in Human Rights — *Jun 2017*
GPA: 3.64
Honors: Dean's List; Odyssey Scholar; Mirae Asset Global Investors Scholarship Recipient ($80,000)

LEGAL EXPERIENCE

Brooklyn Defender Services, Criminal Defense Practice — **New York, NY**
Summer Clerk — *Jun 2023 – Aug 2023*
Will draft motions, legal briefs, and appear on record under attorney supervision.

USC Gould School of Law — **Los Angeles, CA**
Research Assistant to Professor Hannah Garry — *Aug 2022 – Present*
Research existing international mechanisms for refugee protection and victim reparations at the ICC & tribunals.

Student Attorney, International Human Rights Clinic — *Aug 2022 – May 2023*
Represented an Afghan female in an affirmative asylum case. Travelled to Malawi to interview women incarcerated for their acts of self-defense against gender-based violence.

Fair and Just Prosecution — **New York, NY**
Summer Fellow at Westchester County District Attorney's Office: Conviction Review Unit — *May 2022 – Aug 2022*
Drafted a legal & policy recommendation memo on threats to shoot up places. Analyzed case files and transcripts on a case involving a plausible claim of innocence based on conflicting eyewitness testimonies.

PROFESSIONAL EXPERIENCE

Morgan Stanley Alternative Investment Partners — **New York, NY**
Private Equity Investment Associate — *Mar 2019 – Apr 2021*
Executed buy-out opportunities by conducting financial & operational due-diligence in a 2–3-person deal team.

Mizuho Securities — **New York, NY**
Investment Banking Analyst: Financial Sponsors Group — *Jul 2017 – Feb 2019*
Advised private equity funds on acquisition targets and exit options through IPO, divestitures, and M&A.

PRO BONO ACTIVITIES

Parole Justice Works, *Legal Volunteer* — *Jan 2022 – Jan 2023*
Community Legal Aid SoCal, *Intake Volunteer* — *Jan 2022 – May 2022*
International Refugee Assistant Project, *Naturalization Clinic Volunteer* — *April 2022 – May 2022*
Skid Row & Venice Beach Homeless Citation Clinic, *Intake Volunteer* — *Sep 2021 – May 2022*

SKILLS & INTERESTS

Language: Fluent in Korean & Conversational in Chinese.
Interests: Enjoys skiing, ice-skating, wheel pottery, and exploring different metro systems around the world.

On-line Academic Student Information System

OASIS Unofficial Transcript

ID#: 3427027654

askUSC Knowledge Base Start Here

Last Name	First Name
Yong	Hamee

Unofficial Transcript

Current Degree Objective

	Degree Name	Degree Title
MAJOR	Juris Doctor	Law

Cumulative GPA through 20231

	Uatt	Uern	Uavl	Gpts	GPAU	GPA
UGrad	0.0	0.0	0.0	0.00	0.0	0.00
Grad	0.0	0.0	0.0	0.00	0.0	0.00
Law	60.0	60.0	60.0	204.90	54.0	3.79
Other	0.0	0.0	0.0	0.00	0.0	0.00

Fall Term 2021

Course	Units Earned	Grade	Course Description
LAW-515	3.0	4.0	Legal Research, Writing, and Advocacy I
LAW-503	4.0	3.9	Contracts
LAW-509	4.0	3.5	Torts I
LAW-502	4.0	4.1	Procedure I

Spring Term 2022

Course	Units Earned	Grade	Course Description
LAW-531	3.0	3.4	Ethical Issues for Nonprofit, Government and Criminal Lawyer
LAW-516	2.0	4.0	Legal Research, Writing, and Advocacy II
LAW-504	3.0	3.7	Criminal Law
LAW-508	3.0	3.8	Constitutional Law: Structure
LAW-507	4.0	3.5	Property

Fall Term 2022

Course	Units Earned	Grade	Course Description
LAW-667	2.0	3.6	Hale Moot Court Brief
LAW-787	2.0	4.0	Race, Social Media and the Law
LAW-743	2.0	4.0	Federal Criminal Law
LAW-608	4.0	3.6	Evidence
LAW-849	5.0	CR	International Human Rights Clinic I

Spring Term 2023

Course	Units Earned	Grade	Course Description
LAW-817	3.0	4.1	International Arbitration
LAW-721	3.0	3.8	Crime, Punishment and Justice
LAW-602	3.0	3.8	Criminal Procedure
LAW-850	5.0	3.9	International Human Rights Clinic II
LAW-668	1.0	CR	Hale Moot Court Oral Advocacy

May 22, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

It is with great pleasure and without reservation that I write this letter of recommendation for Ms. Hamee Yong. I know Ms. Yong as a student in one of my large 1L class, Criminal Law, where she received an A-.

Ms. Hamee Yong was president of the International Refugee Assistance Project (IRAP) at USC Gould School of Law during her first year. IRAP is a legal aid/advocacy organization focused on refugee rights. During her presidency she coordinated pro bono projects/clinics and collaborated with International Law and Relations Organization (ILRO) and the International Human Rights Clinic to host several events over a year. This student group is in association with about 29 law schools that maintain a school chapter of IRAP.

Ms. Hamee was also a member of the International Human Rights Clinic where she was tasked with two workstream, Affirmative asylum for Afghan female and Trial Watch /Waging Justice for Women. She also was a research assistant for the director of the International Human Rights Clinic and was tasked to with two other research assistants to provide a summary of existing mechanisms to strengthen refugee protection under international law. She was a Hale Moot Court participant.

Hamee's strengths include intelligence, seriousness of purpose, diligence, sound character and enthusiasm. In the classroom, she welcomes challenges, inviting and thriving on intellectually challenging assignments and interactions. Outside the classroom and library, she is personable and highly-regarded by her peers. She has strong interpersonal skills and can carry on intense discussions about emotionally-charged topics with diplomacy, tact and wit. Put differently, she can negotiate the ambiguous and sometimes treacherous social terrain that characterizes law school student bodies in an exemplary way.

Hamee is also committed to engaging in serious reflection on legal issues rather than merely credentializing or padding her resume. Her interest in the study of law as an intellectual adventure has kept her motivated to refine and hone her legal writing. In a word, I do not hesitate to give Ms. Yong the highest recommendation. I am customarily something of a curmudgeon, stingy to a fault with praise. Nevertheless, when I come across someone who has earned and deserves it, I give credit where it is due. Hamee Yong is a student I can recommend with enthusiasm and without qualification. I would be glad to expand on these remarks over the phone or by e-mail.

Sincerely,

Jody David Armour
Roy P. Crocker Professor of Law

JDA/mcm

Jody Armour - jarmour@law.usc.edu - (213) 740-2559

May 22, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

It is my great pleasure to recommend Hamee Yong for a clerkship in your chambers, to begin late summer or early fall 2024. Ms. Yong is currently finishing her second year here at the University of Southern California (USC) Gould School of Law. Last year, she was a student in my Fall 2021 Civil Procedure course, where she earned one of the highest grades in the class. Ms. Yong has demonstrated that she has the skills and the drive to be an excellent judicial clerk.

Ms. Yong is an excellent legal researcher and writer. She earned solid A grades (4.0) in both semesters of her first-year Legal Research and Writing course, as well as a 4.0 in the seminar she completed last semester (Fall 2022) on "Race, Social Media, and the Law." In addition, last year I had my Civil Procedure students write a simple federal court complaint, and Ms. Yong did an outstanding job, earning a grade of 4.3 on the assignment. The heart of the assignment was to write a complaint that would satisfy the most scrupulous judge apply the standards of Twombly and Iqbal. I frame the assignment this way to force students to work with facts rather than legal argument—broadening their skills from what they learn in Legal Writing. Ms. Yong did a marvelous job of presenting the facts I provided in the assignment to her client's advantage in a lively and straightforward way, while also remaining safely within ethical and legal boundaries.

One thing worth noting is that at Gould, rising 2Ls have to choose between being on a law review or participating in our Hale Moot Court Honors Program; they cannot do both. This was a real choice for Ms. Yong, and she chose to participate in moot court. Nevertheless, her interest in writing remains strong, and she plans to complete a Directed Research project before she graduates to write a law review comment comparing the penal systems in the United States and Korea. She has also been working as Professor Hannah Garry's research assistant.

Ms. Yong is already dedicated to advancing the public interest through the rule of law. Indeed, at Gould, she devotes much of her energy to public interest projects. For instance, she is President of Gould's chapter of the International Refugee Assistance Project (IRAP). IRAP is a legal aid/advocacy organization focused on refugee rights, and there are about 29 law schools that maintain a school chapter of IRAP. Ms. Yong coordinates pro bono projects/clinics, such as Afghan Special Immigration Visa (SIV) case support, country conditions research projects, and Title 42 screening clinics. She also collaborated with the International Law and Relations Organization (ILRO) and Gould's International Human Rights Clinic to host several events during the 2022-2023 academic year, inviting a Hong Kong political asylee and activist (Sunny Cheung) to talk about Hong Kong democratic movements and Professor Iryna Zaveruhka and Ambassador Rapp to discuss the Russian war on Ukraine and accountability measures under international law. In addition, Ms. Yong participates and our International Human Right Clinic and runs the Public Interest Law Foundation's pro bono program here at Gould and has accumulated 55 pro bono hours in addition to her clinical work.

In addition to her work in our clinic, Ms. Yong is developing professional experience through other avenues, as well. After her first year of law school, she worked as a Summer Fellow in the Westchester County District Attorney's Officer as part of the Conviction Review Unit. This summer (2023) she will be working with the Brooklyn Defenders Service doing criminal defense work in New York City. Notably, before coming to law school, she worked in investment banking.

Hamee Yong thus offers you a combination of legal research and writing skills, a commitment to public service, and practical experience in both civil and criminal law. She has also demonstrated an excellent ability to manage several complex projects at once while remaining cheerful and confident.

In short, I recommend Hamee Yong without reservation for a judicial clerkship in your chambers. Please do not hesitate to contact me if I can be of further assistance.

Sincerely,

Robin Kundis Craig
Robert C. Packard Trustee Chair in Law
USC Gould School of Law
699 Exposition Blvd.
Los Angeles, CA 90089
Phone: 213-821-8153
E-Mail: rcraig@law.usc.edu

May 22, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to give my enthusiastic support for Ms. Hamee Yong's application for a clerkship in your Chambers. I have known Hamee since April 2022 when I selected her through a competitive interview and application process for enrollment in the International Human Rights Clinic at the University of Southern California ("USC") Gould School of Law, which I direct. She was one of nine students participating in the Clinic in the 2022-2023 academic year (chosen from around 30 that applied). She was also my research assistant ("RA") for the 2022-2023 academic year on international law articles related to enforcement of international refugee law, compensation for atrocity crimes (war crimes, crimes against humanity and genocide), and transitional justice. Together with two other RAs, she met with me on a weekly basis to go over the research questions that I asked her to look into as well as the sources that she found. Finally, I am the faculty supervisor for the International Refugee Assistance Project ("IRAP"), a law student group which she led in the 2022-2023 academic year.

In the Clinic, Hamee worked on three different cases and projects, dedicating 15-20 hours per week on average to the work. One involved representing a female client for affirmative asylum in the U.S. who is an Afghan fleeing gender based and political persecution, which involved in-depth interviewing of the client; drafting of the client's declaration on her persecution claims; drafting of a brief establishing the client's claims under international refugee law and US immigration law; gathering evidence and other documentation to corroborate the client's declaration; and filling out immigration forms. In addition, Hamee and two other Clinic students drafted a memo for an advocacy campaign to classify discrimination against women and girls in Afghanistan as gender apartheid, an international crime, and call for accountability before various UN human rights mechanisms as well as the International Criminal Court. Finally, Hamee worked with three other students on a fair trial rights project in Malawi, surveying women in prisons who have charges against them due to gender-based violence in order to gather data for a report identifying patterns of violations of fair trial rights under international human rights law and advocating for legal reform. This work involved developing a questionnaire for in-depth interviewing; drafting an interview protocol; analysis of court documents for specific cases; and travel to Malawi in February 2023 for conducting the interviews.

Having worked closely with Hamee, I am absolutely certain that she would be an ideal law clerk for the following reasons. First, as demonstrated by her work in the Clinic and RA work, Hamee is bright and a quick learner. This became evident in our Clinic seminar class where we covered the substantive law and procedure for engaging in the Clinic's cases; in our weekly supervision meetings with her, as we reviewed her work product; and in our RA meetings as we analyzed law review articles and books on a given topic. She was always well-prepared, and her questions and comments were often quite insightful and creative on topics of law that were completely new to her. She is quite curious, and her questions evidenced a deep engagement with the material.

Second, Hamee is a natural at collaboration and teamwork. Typically, she worked with one to four other students in her Clinic work and international legal research. The teams reviewed each other's research and drafting, maintained the case files, and led seminar classes together on their casework. I noticed that Hamee leads by example through her strong organizational skills, attention to detail and dedication to making sure that the group work is completed as thoroughly as possible. She is absolutely dependable and reliable, which instills a lot of trust in her and her work.

Third, when finding herself in emotional and intellectually intense classroom discussions, I observed that Hamee remains quite grounded and non-reactionary. She does not shy away from such exchanges or avoid them; rather, she comes prepared with thoughtful, well-backed questions and views, which she offers up after hearing from others first. I have observed this particularly when co-organizing two speaker events in the law school with her in her capacity as president of the student-led IRAP organization. The first event involved hosting a democracy defender from Hong Kong now in exile in the United States, which the Chinese government demanded that USC cancel due to the high enrollment of Chinese students at the university. The second entailed hosting a professor from Ukraine who gave a historical and legal perspective on the ongoing war in Ukraine following Russia's invasion in February 2022, whose family and friends continue to suffer and remain in serious danger for their lives. Both events involved highly emotional presentations and Q/A sessions following. Further, in response to the presentation by the Hong Kong democracy activist, confrontational statements were made by one individual in the audience whom we suspected was doing so at the bidding of the Chinese consulate in Los Angeles to challenge the credibility of democracy protests in Hong Kong. While I played the leading role in moderating these discussions as professor, Hamee did an excellent job helping me to prepare for both events and facilitate productive discussions where all views were allowed and expressed so long as they were done so in a respectful and professional manner, seeking to understand the other and learn through the process.

Finally, on a more personal level, it is a pleasure to interact with Hamee. She is absolutely dedicated to her studies and work, and completes work product in a professional manner. She is hard working, and turns in assignments on time. She is able to multi-task with ease. I have always found that Hamee responds very well to constructive feedback and learns quickly when given direction. In addition, she is a great communicator. Her strong communications skills were evident when she led her fellow students in discussion of her casework during the seminar. She is a natural public speaker and, at the same time, is an active

Hannah Garry - hgarry@law.usc.edu - 213-740-9154

listener who engages well with others in the classroom. More generally, she possesses a level of maturity beyond her years and is pleasant conversationalist with a nice sense of humor. As a result of all of the above, I anticipate that she will earn an A or A+ in the Clinic this spring semester, and currently rank her at the top of the Clinic class. Because of her strong performance as my RA and in Clinic, I have invited her to continue on as my RA over this summer, and she will be joining the Clinic again as an Advanced Clinical student next academic year, assisting me with supervising new Clinic students in their work.

For these reasons, I highly recommend Hamee for a clerkship in your Chambers. If you need any further information, please do not hesitate to write or call.

Best Regards,

Hannah Garry

Hannah Garry - hgarry@law.usc.edu - 213-740-9154

Hamee Yong

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WRITING SAMPLE

The attached writing sample is an excerpt from a brief I submitted for the Hale Moot Court Honors Program at the USC Gould School of Law. The case concerned a legal question of whether the Sixth Amendment right to counsel attaches at a preindictment plea stage.

A brief **statement of facts** is provided below:

The defendant-respondent James Robertson received a target letter informing that he was a subject of a grand jury investigation for money laundering. The Assistant United States Attorney (AUSA) offered an oral preindictment offer that would allow Robertson to plead guilty to one count of tax evasion. The government provided no preindictment discovery. In light of Robertson's representation of innocence, his defense counsel advised him not to accept the preindictment plea, and Robertson rejected the offer. Soon thereafter, a federal grand jury indicted Robertson for conspiracy to launder narcotics proceeds, money laundering, and tax evasion. Strong evidence of his guilt emerged against Robertson. Robertson indicated to the government his interest in receiving another plea offer. The government sent a written plea agreement that required him to plea to all charges as stated in the federal indictment. Robertson entered his guilty plea. Subsequently, Robertson hired a new attorney and filed a motion to withdraw his guilty plea, arguing that his first counsel rendered ineffective assistance of counsel when she advised him not to accept the preindictment plea offer.

The **questions presented** for the competition were:

I. Did the district court properly deny a defendant's motion to withdraw his guilty plea pursuant to a bright-line attachment rule that the Sixth Amendment right to counsel only attaches after adversarial judicial proceedings have begun, given that the bright-line rule follows directly from the plain text of the Sixth Amendment and various policy considerations support it over a functional standard?

II. Even if the defendant's right to counsel had attached at a preindictment plea stage, did the district court properly deny his ineffective assistance of counsel claim because his first defense counsel rendered effective assistance and even if her performance was deficient, the defendant was not prejudiced by her advice?

I represented the plaintiff-petitioner, the United States of America. For this sample, I chose the section of brief addressing only the **first question presented**. This sample has not been edited by others and is entirely my own work.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DENIED DEFENDANT ROBERTSON'S MOTION TO WITHDRAW HIS GUILTY PLEA BECAUSE HIS RIGHT TO COUNSEL DID NOT ATTACH DURING HIS PREINDICTMENT PLEA NEGOTIATION AS A MATTER OF LAW.

The Sixth Amendment guarantees the right of the "accused" to have the assistance of counsel for his defense in all "criminal prosecutions." U.S. Const. amend. VI. The purpose of the Sixth Amendment right to counsel is rooted in the need to protect the accused's right at trial because an average defendant does not have the necessary legal skill to defend himself. Johnson v. Zerbst, 304 U.S. 458, 462-63 (1938)(extending the Sixth Amendment right to counsel to non-capital cases in federal courts); see also United States v. Gouveia, 467 U.S. 180, 190 (1984)(holding that the Sixth Amendment right to counsel does not attach at the time of arrest because it "protect[s] the accused during trial-type confrontations with the prosecutor").

Two distinct inquiries govern the Sixth Amendment right to counsel jurisprudence. Rothgery v. Gillespie Cnty., 554 U.S. 191, 211 (2008). The Sixth Amendment right to counsel attaches only when formal judicial proceedings have begun against an accused. Id. Even after attachment occurs, an accused may assert a Sixth Amendment right to counsel only during "critical stages" of postattachment proceedings. Id. at 212. If no

formal judicial proceedings have begun against an accused, the critical stage inquiry then becomes irrelevant as a matter of law because no attachment occurred. Id.

Following the bright-line attachment rule, the Supreme Court has repeatedly declined to extend the Sixth Amendment right to counsel to preindictment proceedings, even where the same proceedings are critical stages when they occur postindictment. Compare United States v. Wade, 388 U.S. 218, 236-37 (1967)(Sixth Amendment right to counsel in postindictment lineups), with Kirby v. Illinois, 406 U.S. 682, 690 (1972)(no Sixth Amendment right to counsel in preindictment lineups); compare Massiah v. United States, 377 U.S. 201, 205-06 (1964) (Sixth Amendment right to counsel in postindictment interrogations), with Moran v. Burbine, 475 U.S. 412, 431-32 (1986) (no Sixth Amendment right to counsel in preindictment interrogations).

No other courts have extended the Sixth Amendment right to counsel prior to the initiation of formal charges or judicial proceedings. See, e.g., Turner v. United States, 885 F.3d 949, 953-54 (6th Cir. 2018) (declining to extend the Sixth Amendment right to counsel to preindictment plea negotiations).

Defendants may withdraw a guilty plea after the court accepts it but prior to sentencing if they can show a fair and

just reason for requesting the withdrawal. Fed. R. Crim. P. 11(d)(2)(B).

Here, Robertson may not withdraw his guilty plea as a matter of law. His Sixth Amendment right to counsel did not attach at the time of his preindictment plea negotiation because no formal judicial proceedings or prosecution had commenced against him. The bright-line attachment rule should govern preindictment plea negotiations and the inquiry into whether a preindictment plea negotiation constitutes a critical stage is misplaced. Therefore, the district court correctly denied Robertson's motion to withdraw his guilty plea as a matter of law using the well-established bright-line attachment rule.

A. Standard of Review

A district court's denial of a motion to withdraw a guilty plea is reviewed for abuse of discretion. United States v. Cross, 962 F.3d 892, 896 (7th Cir. 2020). The district court does not abuse its discretion unless a defendant 'can show a fair and just reason' for withdrawing his guilty plea. Id.; Fed. R. Crim. P. 11(d)(2)(B). Whether the Sixth Amendment right to counsel attaches to preindictment plea negotiations is a question of law that is reviewed de novo. United States v. Moody, 206 F.3d 609, 613 (6th Cir. 2000) (declining to extend the Sixth Amendment right to counsel to preindictment pleas according to the bright-line attachment rule).

B. The Bright-Line Attachment Rule Follows Directly from the Plain Text of the Sixth Amendment and Upholds the Need for Ex Ante Clarity and Judicial Economy.

The phrase "criminal prosecutions" is unique to the Sixth Amendment and has been interpreted to limit Sixth Amendment counsel guarantee to critical stages at or after adversary judicial proceedings have been initiated. Kirby, 406 U.S. at 690 (declining to extend the bright-line attachment rule to preindictment interrogations).

1. The plain text of the Sixth Amendment commands a bright-line attachment rule.

The plain text of the Sixth Amendment requires that only the "accused" have the right to counsel in "criminal prosecutions." Gouveia, 467 U.S. at 188. The "accused" in criminal prosecutions have been interpreted as individuals "charged with crime" from the very onset of the Sixth Amendment right to counsel jurisprudence. See Powell v. Alabama, 287 U.S. 45, 69 (1932) (explaining that one "charged with crime" requires assistance of counsel); see also Zerbst, 304 U.S. at 467 (holding that an "accused" is "one charged with crime").

The term "criminal prosecutions" limits the Sixth Amendment right to counsel to the initiation of judicial criminal proceedings, which is "far from a mere formalism." Kirby, 406 U.S. at 689-90. Kirby established a bright-line attachment rule, holding that the Sixth Amendment right to counsel attaches

only at or after the initiation of adversary judicial criminal proceedings, whether by way of formal charge, preliminary hearing, indictment, information, or arraignment. Id. at 689. An individual turns into an accused only when the government has committed to prosecute because the commencement of criminal prosecutions marks alone the points at which "the explicit guarantees of the Sixth Amendment are applicable." Id. at 690. Thus, in Kirby, a defendant's Sixth Amendment right to counsel did not attach during his preindictment lineup because he was neither formally charged, indicted, nor arraigned. Id.

The distinction between "criminal prosecutions" under the Sixth Amendment and "criminal case[s]" under the Fifth Amendment has been interpreted to narrow the Sixth Amendment right to counsel to attach only when "prosecution" or "formal judicial proceedings" have been commenced against the accused. Rothgery, 554 U.S. at 222 (Thomas, J., dissenting) (noting that a criminal case under the Fifth Amendment is much broader than a criminal prosecution under the Sixth Amendment). While the Fifth Amendment right to counsel may attach to important preattachment stages of defense, such as police interrogations and identifications, the Sixth Amendment right to counsel does not extend to these proceedings. Compare Miranda v. Arizona, 384 U.S. 436, 478-79 (1966) (Fifth Amendment right to counsel at preindictment custodial interrogations), with Kirby, 406 U.S. at

690 (no Sixth Amendment right to counsel at preindictment interrogations).

Because the attachment question follows directly from the plain text of the Sixth Amendment, it has never been governed by a functionalist inquiry of whether counsel would be valuable at particular stages of the criminal process. See Burbine, 475 U.S. at 431-32. Particularly, the functionalist inquiry has no place for a constitutional guarantee because it cannot turn on a "wholly unworkable" principle, such as the moment of a prosecutor's first involvement, which would "bog the courts down." Rothgery, 554 U.S. at 206. In Rothgery, a defendant's right to counsel did attach at his first appearance before a judicial officer because a formal accusation filed with the court marked the commencement of criminal prosecution, regardless of whether a prosecutor had known about his appearance. Id. at 207, 213.

Thus, the plain text of the Sixth Amendment necessitates a bright-line attachment rule, which evolved from a careful adherence to the words "accused" and "criminal prosecutions." The bright-line rule was drawn exactly where the text of the Sixth Amendment agreed: at or after prosecution, or adversary judicial proceedings have commenced against the accused.

2. Plea processes at a preindictment stage are particularly "amorphous," which necessitates a bright-line attachment rule.

Courts have recognized the need for a bright-line attachment rule that has a "historically and rationally applicable" basis that can provide ex ante clarity to both states and defendants. See Kirby, 406 U.S. at 690; see also United States v. Hayes, 231 F.3d 663, 675 (9th Cir. 2000) (recognizing a need for a "clean and clear rule that is easy enough to follow"). In Kirby, the Court foreclosed any possibility that the Sixth Amendment right to counsel may attach during preindictment proceedings, explaining that the Sixth Amendment right is preserved only for the "accused," or one charged with crime. 406 U.S. at 690-91. Without the state's commitment to prosecute, routine police investigation techniques, such as lineups, do not turn a suspect into an accused who is "faced with the prosecutorial forces of organized society." Id. at 689.

In the context of plea bargains, the Court has noted the highly non-linear and "amorphous" process that plea bargains entail, with "no clear standards or timelines" and lacking "judicial supervision of the discussions between prosecution and defense." Missouri v. Frye, 566 U.S. 134, 143-145 (2012) (explaining the difficulty of defining the duties of defense counsels in pleas); see also Premo v. Moore, 562 U.S. 115, 126

(2011) ("art of [plea] negotiation is at least as nuanced as the art of trial advocacy," removed from judicial supervision). In Frye and Lafler v. Cooper, 566 U.S. 156, 165-66 (2012), the Court recognized postindictment plea negotiations as critical stages of prosecution but did not suggest the Sixth Amendment right to counsel could extend to preindictment plea negotiations. 566 U.S. at 141.

Moving the bright-line rule to encompass any preindictment events, such as interrogations, lineups, or plea offers, jeopardizes the proper investigatory function of the state and constrains judicial economy. See Escobedo v. Illinois, 378 U.S. 478, 494 (1964)(Stewart, J., dissenting). Originally decided as a Sixth Amendment case involving preindictment interrogations, Escobedo was subsequently reframed as a Fifth Amendment privilege against self-incrimination in custodial interrogations, akin to Miranda rights. Kirby, 406 U.S. at 689 (citing Johnson v. New Jersey, 384 U.S. 719, 729 (1966)). If the Sixth Amendment right to counsel were to attach to preindictment proceedings, routine police investigations and interrogations will turn into judicial trials, impeding the legitimate and proper function of the government by imposing an unnecessary and impractical burden on the government to supply public defenders at any suspect's request. See Escobedo, 378 U.S. at 496 (White, J., dissenting).

Hence, the Court should be wary of the direct and collateral consequences of attaching the Sixth Amendment right to counsel to preindictment pleas, which would diminish the ex ante clarity of rights afforded by the bright-line rule and increase the administrative burden on the government without added benefit. Furthermore, moving the bright-line attachment rule to include preindictment pleas may pave the path for criminal defendants to argue for an extension of the same right to other preindictment proceedings that this Court has repeatedly refused to recognize as points of attachment.

3. Other constitutional safeguards outside the Sixth Amendment right to counsel jurisprudence exist to protect the rights of defendants.

The Sixth Amendment right to counsel provides a floor, not a ceiling, protection for the accused, not whenever they may benefit from a lawyer's advice. See Burbine, 475 U.S. at 429-30; see also United States v. Larkin, 978 F.2d 964, 969 (7th Cir. 1992) (the fact that a lawyer's service may be useful in preventing hazards of eyewitness testimonies during preindictment lineups does not justify a constitutional right to counsel). In Burbine, a defendant waived his Fifth Amendment right to counsel and made inculpatory statements during custodial interrogation in the absence of counsel. Id. at 415-16. Although the Court recognized that a confession elicited during police questioning may often seal a suspect's fate, such

concern did not justify a constitutional right to counsel. Id. at 431-32.

Repeatedly, the Court has "declined to depart from its traditional interpretation of the Sixth Amendment right to counsel" in response to policy arguments because other constitutional safeguards protect defendants during pretrial proceedings. See Gouveia, 467 U.S. at 192 (upholding that statute of limitations and Fifth Amendment due process rights afford protection to defendants against the government that deliberately delays formal charges); see also Kirby, 406 U.S. at 691 (explaining that the due process requirements under the Fifth and Fourteenth Amendments forbid unnecessarily suggestive lineups). Moreover, in Miranda, the Court established the right to counsel for suspects under custodial interrogation, requiring the police to explain the right to remain silent and have counsel before initiating any questioning. 384 U.S. at 469-73; see U.S. Const. Amend. V.

In any event, legislatures are free to adopt further protection measures for defendants in addition to well-established constitutional rights. See 18 U.S.C. § 3599(a)(2); see, e.g., Martel v. Claire, 565 U.S. 648, 661-62 (2012) (creating a limited statutory right to counsel in habeas corpus proceedings). In particular to the Sixth Amendment jurisprudence, Congress has legislated beyond the constitutional

right to a speedy trial by enacting the Speedy Trial Act of 1974, which requires specific time limits for completing various stages of a criminal prosecution. See 18 U.S.C. § 3161.

In sum, the policy argument that the Sixth Amendment right to counsel should extend to preindictment pleas because it can be valuable is precisely the line of argument the Court rejected in Burbine. The Sixth Amendment right to counsel guarantees a minimum, but definitive protection for defendants once they are formally charged. Prior to attachment, other constitutional and procedural safeguards protect defendants to ensure the proper administration of justice, with room for legislatures to intervene and provide further protections as they see fit.

C. Robertson's Right to Counsel Did Not Attach at his Preindictment Plea Stage as a Matter of Law Because No Judicial Proceedings Had Commenced Against Him According to the Bright-Line Attachment Rule.

A target letter does not turn a subject of an investigation into an "accused" within the meaning of the Sixth Amendment. United States v. Olson, 988 F.3d 1158, 1163 (9th Cir. 2021); Hayes, 231 F.3d at 674-75 (held that no attachment occurred when a defendant received a target letter and consented to an interview by federal agents). In Olson, a defendant's right to counsel did not attach according to the bright-line attachment rule when he received a target letter that invited him to have

his counsel contact the government if he was 'interested in resolving this matter short of an Indictment.' Id. at 1160-61.

A subject of an investigation does not become an accused within the meaning of the Sixth Amendment when the government offers preindictment pleas. See, e.g., Turner, 885 F.3d at 955; see also Moody, 206 F.3d at 614. In Moody, a suspect voluntarily approached and cooperated with the government after the government successfully searched his home and business under valid warrants. 206 F.3d at 611. He volunteered information about the roles of other targets, and the government offered him a preindictment plea, which he later rejected at the advice of his attorney. Id. However, his Sixth Amendment right to counsel did not attach at a preindictment plea stage because he was an unindicted subject of an investigation. Id. at 614.

Other circuits, such as the First, Third, and Seventh, also have adhered to the bright-line attachment rule in various preindictment contexts. Roberts v. Maine, 48 F.3d 1287, 1291 (1st Cir. 1995) (held that a suspect's right to counsel did not attach at the time he refused to take the blood alcohol test because no formal charges had been brought); Matteo v. Superintendent, SCI Albion, 171 F.3d 877, 892-93 (3d Cir. 1999) (held that the right to counsel attached at a preliminary arraignment proceeding); Larkin, 978 F.2d at 967 (no Sixth Amendment right to counsel at preindictment lineups).

Here, Robertson did not have a Sixth Amendment right to counsel when the government offered a preindictment plea because no formal prosecution had been initiated against him. Like the defendant in Olson who did not turn into an accused when he received the target letter, Robertson did not turn into an "accused" within the meaning of the Sixth Amendment. Furthermore, like the defendant in Moody whose right to counsel did not attach when he received the preindictment offer, Robertson's Sixth Amendment right to counsel did not attach during his preindictment plea negotiation. Preindictment pleas do not trigger the same right to counsel as during postindictment pleas without the commencement of prosecution. Extending the Sixth Amendment right to counsel to the preindictment plea stage only benefits defendants like Robertson who was ready to take a chance and wait until he could further evaluate the government's case against him, only to regret having rejected a favorable preindictment offer. Although preindictment pleas can be an efficient tool, conserving prosecutorial resources and allowing defendants who admit their guilt to receive favorable sentences, the government may be discouraged from offering preindictment pleas if they can open doors to ineffective assistance claims that may end up benefitting defendants who purposely decline the offer in the hopes of avoiding convictions.

Applicant Details

First Name	**Jason**
Last Name	**Zheng**
Citizenship Status	**U. S. Citizen**
Email Address	**jason.zheng@live.law.cuny.edu**
Address	**Address** **Street** **265 Cherry St APT 2H** **City** **New York** **State/Territory** **New York** **Zip** **10002** **Country** **United States**
Contact Phone Number	**9179002365**

Applicant Education

BA/BS From	**City University of New York-John Jay College of Criminal Justice**
Date of BA/BS	**December 2018**
JD/LLB From	**City University of New York School of Law** **http://www.law.cuny.edu**
Date of JD/LLB	**May 16, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**CUNY Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Zalesne, Deborah
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Lung, Shirley
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Rossein, Rick
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Parkin, Jason
jason.parkin@law.cuny.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am a rising third-year law student at the City University of New York (CUNY) School of Law, and I am writing to apply for the clerkship opening in your chambers for August 2024. Having grown up in a low-income immigrant neighborhood, I understand the value of community and public service. Enclosed with my application is evidence of my commitment to public service throughout my career. Working in Maryland this summer, I realized that a federal clerkship in the Mid-Atlantic would be an excellent and fulfilling way to continue my career in public service.

In law school, I have focused my energy on gaining as much experience in courtrooms as I can. My judicial internships at the Second Circuit U.S. Court of Appeals and the New York State Supreme Court have exposed me to a law clerk's work. As a judicial intern, I have been responsible for digesting case facts, researching novel areas of the law, and writing concise and precise memos for judges. This experience has helped me to analyze issues from multiple perspectives, allowing me to approach cases objectively and effectively. I also now understand the need to balance meeting deadlines while maintaining clarity, concision, and accuracy. This summer, I plan to continue improving these legal research and writing skills as a Summer Associate at a Baltimore civil rights law firm.

Please find my resume, writing sample, and transcripts enclosed. My letters of recommendation will be sent separately from my recommenders. They are:

Shirley Lung
Professor of Law
Lung@law.cuny.edu
718-340-4322

Jason Parkin
Co-Director, Economic Justice Project & Professor of Law
Jason.parkin@law.cuny.edu
718-340-4621

Merrick T. Rossein
Professor of Law
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718-340-4316

Deborah Zalesne
Professor of Law
Zalesne@law.cuny.edu
646-637-3708

Thank you for your consideration, and I hope to have the opportunity to interview with you.

Respectfully,
Jason J. Zheng

JASON J. ZHENG (He/Him)

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EDUCATION

CITY UNIVERSITY OF NEW YORK SCHOOL OF LAW
J.D. Candidate, May 2024; GPA: 3.8; Pipeline to Justice Alumni; Trial Practice Student: see videos.
Leadership Activities: Vice President, Asian Pacific American Law Student Association; Senior Staff Editor, Law Review; Vice President, American Constitution Society; Teaching Assistant for Professor Deborah Zalesne's 1L Contracts Class.

JOHN JAY COLLEGE OF CRIMINAL JUSTICE (City University of New York)
B.S. Criminal Justice, December 2018; Minor in Theater Arts.

EXPERIENCE

CREATING LAW ENFORCEMENT ACCOUNTABILITY & RESPONSIBILITY (CLEAR) CLINIC, CUNY SCHOOL OF LAW, Long Island City, NY, Fall 2023
Prospective Student Attorney: Provide pro bono legal representation in support of partner communities and movements. Represent and advise clients concerning government policies and practices related to national security, counterterrorism, and Chinese espionage.

BROWN, GOLDSTEIN & LEVY, Baltimore, MD, Summer 2023
Summer Associate: Assist in cases on behalf of exonerees in state and federal wrongful conviction proceedings, including researching and drafting petitions for compensation and written discovery requests. Support ongoing litigation in federal civil rights matters, including employment, immigration, fair housing, trans, and disability rights.

JUDGE MYRNA PÉREZ, U.S. COURT OF APPEALS, SECOND CIRCUIT, New York, NY, Spring 2023
Judicial Extern: Reviewed immigration removal proceeding petitions and wrote bench memos analyzing whether to grant, deny, or move petitions to the regular argument calendar. Researched relevant case law, statutes, and the appropriate standard of review. Reviewed new Second Circuit opinions and wrote bench memos on whether Judge should call for *en banc* review. Proofread, blue booked, and cited checked opinions and summary orders. Observed oral arguments and participated in post-argument roundtable chamber conferences.

MANHATTAN DISTRICT ATTORNEY'S OFFICE, RACKETS BUREAU, New York, NY, Fall 2022
Legal Intern: Assisted with investigations on white-collar matters involving wage theft, financial and tax fraud schemes, and illicit money movements, including cryptocurrency money laundering and wire fraud. Researched and wrote memos analyzing the legality and admissibility of evidence and statements. Observed criminal court proceedings and conferences. Cabined and reviewed discovery materials. Ensured that exculpatory and impeachable evidence was given to defense counsel consistent with statutory and Constitutional requirements. Helped prepare for *Mapp*, *Huntley*, and *Dunaway* hearings.

JUSTICE PINEDA-KIRWAN, NEW YORK STATE SUPREME COURT, Mineola, NY, Summer 2022
Judicial Intern: Worked on property and employment cases. Digested case files, researched relevant law, and wrote bench memos analyzing whether to grant or deny a motion. Worked on summary judgment, motion to dismiss, and order to show cause motions. Observed preliminary, compliance, certification, settlement, and motion conferences. Observed bench trials.

JING FONG RESTAURANT, New York, NY, 2017 – 2020
Manager: Managed over 100 employees. Developed and executed strategic plans to increase profit margins.

TWO BRIDGES COMMUNITY COUNCIL, New York, NY, 2014 – Present
Representative & Community Organizer: Represent the Two-Bridges Chinese community. Speak on their behalf about community concerns and needs. Translate vital Section-8 housing information to 70 Chinese tenants. Organize community events such as the Lunar New Year celebrations, Hurricane Sandy food and shelter relief, and summer night youth basketball tournaments. Facilitated food pantry for the community during the Covid-19 pandemic.

PERSONAL

Proficient Cantonese speaker; Chinese lion dancer; weightlifter; history buff.

Law Student Copy Academic Record

Name: Jason Zheng
Student ID: 16074881

Birthdate: 06/10
Student Address: 265 Cherry Street Apt 2H
New York, NY 10002-7933
Print Date: 06/06/2023

Other Institutions Attended:

Academic Program History

Program: Law
06/09/2021: Active in Program
06/09/2021: Law JD Major

---------- **Beginning of Law Record** ----------

2021 Fall Term

Course	Description	Earn	Grd
LAW 701	Contract Law Market Economy I	3.00	CR
Contact Hours:	3.00		
LAW 705	Legal Research	2.00	CR
Contact Hours:	2.00		
Course Attributes:	ZERO Textbook Cost		
LAW 7004	Lawyering Seminar I	4.00	CR
Contact Hours:	4.00		
LAW 7043	Liberty Equality & Due Process	3.00	CR
Contact Hours:	3.00		
LAW 7131	Crim L-Rsp Inj Condu	3.00	CR
Contact Hours:	3.00		

2022 Spring Term

Course	Description	Earn	Grd
LAW 702	Contracts: LME II	3.00	A-
Contact Hours:	3.00		
LAW 709	Civil Procedure	3.00	A
Contact Hours:	3.00		
LAW 7005	Lawyering Seminar II	4.00	A-
Contact Hours:	4.00		
LAW 7141	Torts-Rsp Inj Conduc	3.00	A
Contact Hours:	3.00		
LAW 7161	Law and Family Relations	2.00	A-
Contact Hours:	2.00		

Academic Standing Effective 06/28/2022: Good Academic Standing

2022 Summer Term

Course	Description	Earn	Grd
LAW 780	Criminal Procedure: Investigat	3.00	A-
Contact Hours:	3.00		

2022 Fall Term

Course	Description	Earn	Grd
LAW 811	Criminal Procedure:Adjudica	3.00	A
Contact Hours:	3.00		
Course Attributes:	Low Textbook Cost		
LAW 7192	Constitutional Structures	3.00	A
Contact Hours:	3.00		
LAW 7251	Public Institutions/Admin Law	3.00	A-
Contact Hours:	3.00		
LAW 7261	Federal Courts	3.00	A-
Contact Hours:	3.00		
LAW 7723	Teaching Assistant	2.00	A
Contact Hours:	3.00		

Academic Standing Effective 01/18/2023: Good Academic Standing

2023 Spring Term

Course	Description	Earn	Grd
LAW 804	Law Review Editing	1.00	CR
Contact Hours:	3.00		
LAW 825	Lawyering Seminar III	4.00	A
Course Topic:	TRIAL PRACTICE		
Contact Hours:	4.00		
LAW 7151	Property: Law & Market Eco III	4.00	A
Contact Hours:	4.00		
LAW 7292	Evidence-L&Pub Int 1	4.00	B+
Contact Hours:	4.00		
LAW 7723	Teaching Assistant	2.00	A
Contact Hours:	3.00		

2023 Fall Term

Course	Description	Earn	Grd
LAW 861	CLEAR Clinic		
Contact Hours:	12.00		
LAW 7726	Topics In Law		
Course Topic:	Approaches to Discrimination		
Contact Hours:	3.00		

End of Law Student Copy Academic Record

June 2, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am pleased to write a letter recommending Jason Zheng for a federal clerkship. Mr. Zheng was a student in my year-long Contracts class his first year and was then my teaching assistant the following year. From our many interactions, I find him to be an a highly motivated student who demonstrates a strong commitment to the public interest.

In Contracts, Mr. Zheng was able to distinguish himself right away. He is a serious student with exceptional legal reasoning and writing skills. He reads cases with attention to detail and uses them effectively to make persuasive legal arguments. These skills earned him close to the top grade in Contracts, a large lecture class. Mr. Zheng is exceptionally smart, passionate about CUNY Law's public service values, and eager to implement them in his work. I would easily rank him as among the top five percent of students I have taught over the past twenty odd years.

Not only is his writing exceptional, but Mr. Zheng was also a frequent class participant in Contracts, consistently elevating the level of class discussions. His diverse experiences before and during law school reflected positively on his ability to analyze fact patterns. He regularly brought to bear in classroom dialogue his perspective as a leader, mentor, and advocate in his Asian immigrant community in New York. From this vantage, he effectively challenged assumptions and provided texture and depth to discussions about the impact of sexism, racism, and other inequalities on bargaining. In discussions with him both in and out of the classroom, he showed an impressive ability to step outside the confines of doctrine to understand how aspects of the law would likely have real effects on the conduct of individuals. He has a depth of interest and understanding that is a strong indicator of real talent for law.

Based on Mr. Zheng's maturity and understanding of the law, as well as the respect he commands from his peers, I sought him out to be a teaching assistant for my Contracts class this past year. In this capacity
he tutored individual students, provided feedback on writing assignments, and conducted review sessions for the entire class. Needless to say, Mr. Zheng's work was exceptional. The students found him approachable and knowledgeable about contract law, and I found his assistance invaluable.

In addition to academics, Mr. Zheng has also been very engaged in the law school community, where he is highly regarded among his peers for his passion, vision, and unique voice, and where I have witnessed his strong leadership skills and deep concern for others.

Overall, I am certain Mr. Zheng will be a dynamic legal scholar and effective advocate. I am confident he will continue to distinguish himself in whatever endeavors he undertakes and I recommend him without hesitation. If you would like additional information, please feel free to call me at 646.637.3708.

Sincerely,

Deborah Zalesne
Professor of Law

Deborah Zalesne - Zalesne@law.cuny.edu - _718_ 340-4328

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to strongly recommend Jason Zheng for a federal clerkship. Mr. Zheng has a strong academic record matched by both work and personal experiences that show a passionate commitment to civil rights litigation across a broad spectrum of areas. He has a compelling sense of personal, community, and professional purpose. Mr. Zheng has strong legal analytical, research, writing, and advocacy skills, as well as a superior ability to work with others. I have no doubt that he will bring intelligence, resourcefulness, and precision to his work as a law clerk.

Mr. Zheng was a student in my Torts class in Spring 2022. The Torts course integrates doctrine and theory with practice skills, and addresses the impact of race, gender, class, and immigration status on limiting the remedies available to someone when they are harmed by state or private behavior. As demonstrated throughout the semester, Mr. Zheng's legal analytical and writing skills are very strong. He tackles difficult legal issues and assignments, and analyzes problems, with clarity, precision, and thoroughness. Mr. Zheng demonstrated an excellent ability to master doctrine, and a fluid ability to use relevant law and facts. He cogently and diligently analyzes facts from many perspectives, and exercises excellent judgment in generating alternative positions. Other students often commented that the hypotheticals that Mr. Zheng posed to clarify doctrine were immensely helpful in their gaining a more nuanced understanding of tort rules.

Beyond strong analytic skills, I was most impressed by Mr. Zheng's constant desire to connect up all of what he was learning in his first-year courses to understand the tools and strategies that a civil rights attorney has at their disposal for representing marginalized communities. Mr. Zheng's questions sought to integrate doctrinal substance with procedural rules, and theory with nuts and bolts practice. I could tell even at that early point of his law school career that he was focused on developing the skills and habits needed by a successful practicing attorney who masters substance, procedure, and practicalities. I also appreciated Mr. Zheng's critical engagement with systemic structures that shape tort law and policies. His comments underlined the need for reform to make these systems, as well as government, more responsive to the needs of marginalized communities.

Mr. Zheng has a passionate commitment to litigation, advocacy, and reform to hold "systems" and government accountable to communities that are exploited, whether by private parties or governmental actors. From our conversations, he speaks powerfully about the importance of constitutionalism. As a child raised by immigrant parents in New York City's Chinatown, he has borne witness to how new immigrants have been impacted by exploitation as well as adverse governmental practices. I have no doubt that Mr. Zheng will become an intelligent and staunch advocate. He has a strong sense of his own path as a lawyer safeguarding civil and human rights.

Mr. Zheng has shown that he can function at a high level in mastering new subject matter, and integrating himself into the professional norms and expectations of diverse legal environments. It is evident from his resume that Mr. Zheng has worked assiduously to hone his legal analytical, research, and writing skills, as well as subject matter exposure, across a wide range of issues. These include national security and counterterrorism, wrongful convictions, immigration removal proceedings, white collar crimes (wage theft, tax fraud, money laundering), and employment law. Further, he has worked in different types of legal environments, including law school clinic, judicial clerkship, small firm practice, and government law office.

I am equally confident that Mr. Zheng will bring a strong sense of professionalism and great respect toward everyone that he will interact with in the legal system. It has been a privilege to work with Mr. Zheng. He is hard-working, refreshingly inquisitive, humble, collaborative, creative, and engaged. He carries a strong sense of fellowship and community in how he implements his work.

I highly recommend Mr. Zheng for a federal clerkship. If you have questions, please do not hesitate to contact me.

Sincerely,

Shirley Lung
Professor of Law
CUNY School of Law

The City University of New York

CUNY SCHOOL OF LAW

Law in the Service of Human Needs

Prof. Merrick Rossein
Professor of Law
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2 Court Square
Long Island City, NY 11101-4356

June 11, 2023

Dear Judge:

I enthusiastically recommend Mr. Jason Zheng for a Clerkship. I am confident that Mr. Zheng will be an excellent Clerk and attorney. His analytic, writing, research, and speaking abilities are excellent.

Mr. Zheng was in my Trial Practice Seminar in the spring 2023 semester. I asked him to serve as a Teaching Assistant (TA) in the spring 2024 semester, a position reserved for the best students. He consistently demonstrated excellent work in the Trial Practice class. He was one of the best among a very strong group of students.

The Trial Practice Seminar involved the students in learning and role playing trial preparation. Each student conducted pretrial depositions, argued a motion *in limine*, practiced direct and cross examination, opening, and closing arguments. He was critiqued by outstanding guest trial lawyers. He participated in a full in-person trial before a mock jury. His trial performance was excellent. The trial, including the pre-trial conference with the Judge where he argued a motion in limine, lasted over five hours. His direct was well developed and performed. His closing argument was powerful, locking eyes with the jurors and speaking directly to them without notes. Each student also produced a number of memoranda of law, a pre-trial memorandum, and a trial notebook. Although the seminar is four credits, the students actually put in more than four credits worth of work. It is a very demanding class. Mr. Zheng was a strong student who was consistently and thoroughly prepared to engage in high-level work.

Mr. Zheng is very bright with a keen intellect. He demonstrates excellent analytical and clinical judgment skills. His writing is clear and concise. His oral skills are excellent. He maintains a calm demeanor while persuasively arguing legal and factual points with strength. He learned well the critical importance of facts in litigation.

He worked very hard preparing all his in-role assignments and performed excellently. He was particularly good at critiquing his colleague's work. His classmates very well respected him. Mr. Zheng is also deeply reflective and insightful about his work and developing lawyering skills. He examined each piece of work after completion to learn from both his strengths and the areas with which he identified as needing more attention. He was also an adept collaborator with his "co-counsel" with whom he worked diligently. He is both a strong learner and teacher.

To place my reference in context, in addition to being on the faculty for over thirty-six years and the former Acting Dean, I continue to practice law and am currently serving as a litigation consultant to the U.S. Department of Justice, Civil Rights Division assisting in a sexual harassment case in Maryland. In 2021 I served the Civil Rights Division as an expert assisting in implementing a consent decree in a sexual harassment case in Florida. I served as the Independent Investigation Counsel for the NYS Assembly Standing Committee on Ethics and Guidance responsible for investigating claims of harassment, discrimination, and/or retaliation against assembly members.

I was a civil rights trial lawyer for many years. I litigated numerous race, sex, age, and disability discrimination cases, including the landmark sexual harassment case of *EEOC v. Sage Realty Corporation,* in which I prevailed for my client after trial. In another case, *Leibovitz v. New York City Transit Authority*, the recently passed U.S. District Court Judge Jack B. Weinstein in the attorneys' fees decision wrote: "Counsel [Rossein] ...is an extraordinarily able attorney specializing in discrimination litigation. *** Counsel was dealing with a difficult area in this field. He showed extraordinary skill [at trial]." *See,* 1999 WL 167688 E.D.N.Y. February 25, 1999.

I was selected and served for three years as the Independent EEO Consultant based on a U.S. District Court decision and remedial order in *U.S. and the Vulcan Society v. the City of New York.* After the court found that the New York City Fire Department's hiring practices discriminated based on race and ordered major reforms, the court mandated that a consultant develop compliance reform.

Mr. Zheng, in addition to being an outstanding student committed to public service law, is also a wonderful person with whom to work. He is an interesting and involved person. He is very inquisitive and is always seeking to learn and become an outstanding social justice lawyer. I am confident that he will do excellent work and promises to be an outstanding Clerk and lawyer. I have no doubt that he will be a valued asset to you. Please let me know if you need additional information.

Sincerely,

Merrick T. Rossein

Merrick T. Rossein
Professor of Law

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

It is my pleasure to recommend Jason Zheng, a member of the City University of New York School of Law's class of 2024, for a clerkship in your chambers. I am a Professor of Law at CUNY, and I have known Jason since August 2021, when he began as a student in my first-year Lawyering Seminar. Based on his performance in that course, as well as the conversations I have had with him about his goals as a law student and future lawyer, I believe that he is a strong candidate for a clerkship in your chambers.

Jason consistently stood out in my Lawyering Seminar, making insightful and constructive contributions during every class session. The Lawyering Seminar is an intensive, four-credit course that teaches legal reasoning, professional responsibility, legal writing, and other lawyering skills by integrating clinical methodology with substantive, theoretical, and doctrinal material. Over the course of the semester, Jason interviewed his simulated client, drafted and revised legal memos that analyzed the strengths and weaknesses of his client's claims, and counseled his client about the client's options in light of his research and analysis. Jason performed each task very well; he brought a sensitive, client-centered approach to his interactions with his simulated client, and his legal analysis and writing was thorough, well-reasoned, and concise.

As I got to know Jason through his work in class, I became impressed by his dedication to becoming the best lawyer he can be. He routinely stayed after class and came to my office hours looking for ideas and tips for sharpening his analysis and improving his writing. He wanted to chat about the cases we were reading and how they might affect his client's situation. He absorbed all of the feedback I sent his way, skillfully incorporating it into his subsequent work. And through it all, he remained focused on developing his lawyering skills with an eye toward best serving his future clients. I can't think of a better attitude for a student to bring to their first year of law school.

As I got to know Jason over the past two years, I came to appreciate his drive to be an excellent attorney. Prior to law school, he founded and ran an e-commerce business and managed a restaurant in Manhattan. He learned the value of legal expertise and the harms caused by legal systems that can be so dismissive of basic human needs. He has also been a leader in his community, serving as tenant representative, translating vital legal information, and helping to run a food pantry during the pandemic. And since beginning law school, he has sought out opportunities that will give him a strong foundation for a career in litigation. He has been a summer intern in the Manhattan District Attorney's Office and a civil rights law firm; he has interned with federal and state court judges at the trial and appellate levels; he has completed CUNY's rigorous trial practice course; and next fall he will participate in the law school's Creating Law Enforcement Accountability and Responsibility (CLEAR) Clinic. Taken together, these experiences give Jason a broad perspective on litigation and advocacy and an essential set of lawyering skills that will serve him well as a law clerk.

In short, Jason is a smart, hardworking, and focused law student with an impressive drive to become an excellent lawyer. He is a quick learner who is enthusiastic and curious about the law and legal practice. I would be happy to discuss this recommendation further. I can be reached at 212-222-1008 (cell) and jason.parkin@law.cuny.edu.

Sincerely,

Jason Parkin
Professor of Law

JASON J. ZHENG (He/Him)

265 Cherry Street, Apt. 2H, New York, NY 10002 | (917) 900-2365 | Jason.Zheng@live.law.cuny.edu

Writing Sample

This writing sample is a memorandum of law I wrote for my Trial Practice Seminar. It sets forth the points that we, the Defendants, intend to prove in a Title VII retaliation jury trial. This version of the memorandum contains no edits or feedback from anyone.

PRELIMINARY STATEMENT

Plaintiff Diane Leibovitz brought this action claiming retaliation under Title VII of the 1964 Civil Rights Act (as amended, 42 U.S.C.§§ 2000e et seq.) Defendants Monroe Easter, Joseph Hoffman, and the New York Transit Authority ("TA") (hereby "Defendants") submit this pre-trial memorandum of law setting out the points they intend to prove at trial.

Plaintiff's claim of retaliation is meritless. She can neither make out her prima facie burden nor disprove the Defendants' legitimate non-retaliatory reasons. She failed to establish materially adverse action affecting the terms and conditions of her employment. Instead, the TA's actions benefited her. Even if Plaintiff could establish materially adverse action, she cannot prove that there was a causal connection between this action and her protected activity because Defendants took corrective actions to address her shortcomings before her report. Moreover, the Defendants' legitimate reasons were not pretextual because their actions were normal TA practice.

FACTUAL BACKGROUND

The TA's job is to keep the New York City subway system safe for its 2.8 million daily riders. It is an organization that invests in its employees by promoting from within. Mr. Hoffman and Mr. Easter are great examples of TA lifers, both having spent the last 24-plus years as TA employees, holding numerous positions. Mr. Hoffman began working for the TA in 1988 as a Clerk and held positions as an Electrician, Chief Mechanical Officer, and now the Vice President. (Hoffman Dep. 5:1-10, June 16, 2022). Mr. Easter started his career in 1996 (Easter Dep. 13:20-22, June 24, 2022), and today, he is the 240th Street Maintenance Shop ("240 shop") Superintendent. (Easter Dep. 5:18-21, June 24, 2022). In 2021, while in this leadership role, Mr. Easter had three Deputy Superintendents reporting to him: Charles Figliola, Russell Woodley, and Plaintiff Diane Leibovitz. (Easter Dep. 5:7-13, June 24, 2022).

Plaintiff started working for the TA in 2014 as Director of Budget and Administration. (Leibovitz Dep. 15: 6-10, Aug. 15, 2022). Two years later, the TA invested in her and created a unique position for her to shift from administrative work to operations. (Leibovitz Dep. 31:8-16, Aug. 15, 2022). The TA supported Plaintiff's desire to work in an operational role and made her "Deputy Superintendent in Training" of the 240 shop. Id. Eventually, the TA gave Plaintiff the opportunity to work at the Corona Maintenance Shop ("Corona shop") as an official Deputy Superintendent for the car appearance unit. (Leibovitz Dep. 58: 6-13, Aug. 15, 2022). Approximately five months later, she had the opportunity to work in the inspection unit at the Corona shop. (Leibovitz Dep. 63: 17-21, Aug. 15, 2022). A few months later, she was transferred within the Corona shop again and had the opportunity to work in train troubles. (Leibovitz Dep. 76: 22-24, Aug. 15, 2022). Then, sometime in 2019-2020, she was transferred back to the 240 shop and was in charge of the inspection line unit. (Leibovitz Dep. 83: 8-10, Aug. 15, 2022).

In May of 2021, Monroe Easter was transferred to the 240 shop and became Plaintiff's direct supervisor. (Easter Dep. 4:22-24, June 24, 2022). Mr. Easter oversaw the maintenance of car equipment and ensured service to the "1" train. Id. Mr. Easter observed that Plaintiff was deficient in her knowledge of car equipment and did not have the training to succeed in her position, jeopardizing the safety of subway operations. For example, under her management, there were issues with subway brakes, malfunctions with air conditioners, general maintenance issues, and failure to complete repairs. Mr. Easter had several conversations with Plaintiff about remedying these issues and made recommendations based on his experience and expertise. (Easter Dep. 169, July 21, 2022). The problems were ongoing from May-August, and at one point, another TA employee reported that a subway brake was found on the street after it fell off a suspended train track. (Easter Dep. 211-212, July 24, 2022). This brake incident was a serious matter for the